88-30

No.———

In The
Supreme Court of the United States
October Term, 1988

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THE HORN & HARDART COMPANY,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

———o———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The "further relief" provision of the Declaratory Judgment Act, 28 U.S.C. § 2202, authorizes the award of further relief "based on a declaratory judgment" against a party "whose rights have been determined by such judgment."

1. Did the court below err in concluding that this provision "reserved" jurisdiction in the District Court after a prior notice of appeal and affirmance by the Court of Appeals divested the District Court of all jurisdiction, contrary to the established rule that the Declaratory Judgment Act has no effect on jurisdiction?

2. Is Section 2202 intended to effectuate relief based on the declaratory judgment—as the Eighth and Tenth Circuits, among other courts, have ruled—or may it be used more broadly to initiate an action for damages and attorneys' fees that does not effectuate the underlying judgment but instead requires judgment on new issues, as the court below decided?

3. May a party defend against an action for declaratory, injunctive, and monetary relief—seeking declaratory relief of its own—and then, only after that matter is finally resolved in all courts, elect under the guise of Section 2202 to seek damages arising from the same transaction?

PARTIES TO THE PROCEEDINGS

Petitioner The Horn & Hardart Company, plaintiff-appellant below, is a Nevada corporation engaged in the food service and mail order business. Pursuant to S. Ct. Rule 28.1, petitioner states that it has no publicly-owned parents, subsidiaries, or affiliates.

Respondent and defendant-appellee below National Railroad Passenger Corporation is a District of Columbia corporation created by federal statute, 45 U.S.C. § 541.

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Petitioner The Horn & Hardart Company ("Horn & Hardart") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on April 8, 1988.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 843 F.2d 546 and is reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court (Gasch, J.) is reported at 659 F. Supp. 1258 and is reprinted at App. 12a. A prior opinion of the Court of Appeals in this same case is reported at 793 F.2d 356 and is reprinted at App. 37a. A prior opinion of the District Court is unreported and is reprinted at App. 50a.

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JURISDICTION

This action was originally commenced by petitioner as a declaratory judgment action in the District Court on the basis of diversity of citizenship. The District Court issued a declaratory judgment in favor of respondent on May 30, 1985, App. 50a, and that ruling was affirmed by a divided Court of Appeals on June 17, 1986. App. 37a. On August 19, 1986, respondent filed a petition for further relief with the District Court pursuant to 28 U.S.C. § 2202. Petitioner contends that the District Court lacked jurisdiction to consider the petition. *See infra* at 10-17. The District Court granted the petition on April 23, 1987. App. 12a. Petitioner appealed, and the Court of Appeals affirmed on April 8, 1988. App. 1a. The jurisdiction of this Court to review the judgment of the Court of Appeals rests upon 28 U.S.C. § 1254(1).

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PERTINENT STATUTE

The Declaratory Judgment Act, as codified at 28 U.S.C. §§ 2201-2202, provides in pertinent part:

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * *

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

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STATEMENT OF THE CASE

Horn & Hardart is, in the words of the court below, "a familiar corporate face in New York." App. 38a. In 1967 Horn & Hardart rented space in New York City's Penn Station from The Pennsylvania Railroad Company, establishing three separate restaurant facilities on the premises. The term of Horn & Hardart's lease, with re-

newal options, ran to the year 2002, and Horn & Hardart invested heavily in the restaurants. Respondent National Railroad Passenger Corporation ("Amtrak") succeeded to The Pennsylvania Railroad Company's interest as landlord, and in 1980 the lease was superseded by three separate leases. Two of the leases had terms of twelve years with ten-year renewal options; the third lease had a term of 22 years. All three of the 1980 leases could thus run to 2002, like the original 1967 lease.

On November 29, 1984, however, Amtrak served 90-day notices of its intent to terminate these long-term leases. Each lease contained a provision specifying that Amtrak could terminate the leases if it "shall require the demised premises for its Corporate purposes" or in the event of "re-construction or demolition of the terminal building." Amtrak stated that it was terminating the leases to install a new ticket facility in and near the portion of the terminal building occupied by the restaurants. App. 38a-39a.

Horn & Hardart objected to the proposed termination, contending that the termination clause did not authorize Amtrak's actions. Horn & Hardart noted that during the lease negotiations it had successfully opposed a more sweeping termination clause that would have granted Amtrak the right to terminate if it "desired" to use the demised premises for transportation or public service purposes, or for reconstruction of that "portion" of the building containing the demised premises. Horn & Hardart's basic argument was that Amtrak could not invoke the termination clause because it did not *require* the premises but simply desired to use them, and because the entire

building was not being reconstructed, but only that *portion* in which the restaurants were located. App. 39a-43a.

Horn & Hardart strongly believed that Amtrak had no legal right to terminate the leases, and unsuccessfully attempted to convince Amtrak of its legal position throughout extended negotiations. Despairing of these efforts, Horn & Hardart sought a judicial resolution of the dispute, filing suit in the United States District Court for the District of Columbia on March 12, 1985. Horn & Hardart sought a declaratory judgment that its construction of the termination provision was correct, as well as damages and injunctive relief.

Amtrak thereupon filed eviction proceedings in state court in New York, and moved in the District Court for the District of Columbia to dismiss Horn & Hardart's complaint or, in the alternative, for summary judgment. Although the leases at issue provided for liquidated damages of triple rent in the event of holdover, and attorneys' fees in the event of default on the part of the lessee, Amtrak did not seek any such relief in response to Horn & Hardart's complaint. The parties accordingly litigated solely over Amtrak's assertion that it had a right to terminate the leases under the "Corporate purposes" clause.

The District Court granted summary judgment in Amtrak's favor on May 30, 1985, App. 50a, 59a, and Horn & Hardart appealed. Although continuing to believe in the correctness of its legal interpretation of the lease provisions at issue, Horn & Hardart recognized that there had now been a judicial determination to the contrary. Horn & Hardart accordingly decided not to resist Am-

trak's eviction efforts, and the premises were vacated by August 5, 1985.[1] On June 17, 1986, the Court of Appeals—in a divided decision—affirmed the District Court's ruling, bringing an end to the litigation. App. 37a.

Or so Horn & Hardart thought. Over two months *after* the Court of Appeals affirmed the District Court ruling in all respects, Amtrak filed a motion with the District Court, seeking "further relief." The further relief consisted of the triple rent liquidated damages and attorneys' fees that Amtrak now elected to claim for Horn & Hardart's alleged wrongful holdover and default. Amtrak based its motion on 28 U.S.C. § 2202, which provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Horn & Hardart opposed Amtrak's motion, arguing that the District Court had no continuing jurisdiction over the case, that 28 U.S.C. § 2202 was not intended to apply to claims such as Amtrak's, and that those belated claims were barred because of Amtrak's failure to raise them in the prior course of litigation. Horn & Hardart also argued that Amtrak was wrong on the merits, and was not entitled to liquidated damages or attorneys' fees for the period in which Horn & Hardart was seeking, in good faith, a judicial resolution of the dispute.

The District Court held that it had jurisdiction to hear Amtrak's motion, even though the appellate court's

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[1] Horn & Hardart paid Amtrak the rent due under the leases for the entire period it occupied the premises.

mandate had not granted it any further jurisdiction. The trial court ruled that "[t]here was no way the appellate mandate could provide for Amtrak's decision to seek further relief since that decision did not become full-blown until after the mandate had issued." App. 17a. The District Court rejected Horn & Hardart's argument that 28 U.S.C. § 2202 was limited to further relief to effectuate the underlying declaratory judgment, although it acknowledged that "[a] few state courts have so held." App. 18a.

The District Court further held that Amtrak's claims were not barred by failure to raise them during the prior course of litigation. The court frankly recognized that "if applicable, traditional res judicata bars Amtrak's petition for further relief" and that application of the rules set forth in the *Restatement (Second) of Judgments* "would result in res judicata barring Amtrak's petition." Acknowledging that it was breaking new ground, the District Court consciously decided to create an exception to established res judicata doctrine and permit Amtrak to pursue its claims, finding the present case "deserving of special treatment." App. 24a-25a.

Turning to the merits, the District Court rejected Horn & Hardart's arguments that the liquidated damages and attorneys' fees clauses were not implicated by Horn & Hardart's conduct. According to the District Court, it made no difference that Horn & Hardart's initial refusal to surrender the premises was based on a reasonable and good faith understanding of its legal rights, or that Horn & Hardart was litigating with Amtrak to establish those rights and vacated the premises upon the initial adverse judicial decision. The District Court awarded Amtrak

$335,017.30 in triple rent damages and $52,562.02 in attorneys' fees. App. 35a-36a.

Horn & Hardart appealed, and on April 8, 1988, the Court of Appeals affirmed. The court first held that the District Court had not been divested of jurisdiction, because the Declaratory Judgment Act "reserved" jurisdiction for further proceedings in the District Court. App. 4a. The court did not discuss Horn & Hardart's argument that the Declaratory Judgment Act could not have accomplished such a result, because it was not intended to alter the jurisdiction of the federal courts in any way.

The court below next held that Amtrak's claim for further relief was within the scope of 28 U.S.C. § 2202 as "proper" further relief, because "a valid notice of termination"—the issue decided in the first appeal—"was the only factual and legal predicate necessary for recovery of liquidated damages and costs." App. 6a. At the same time, however, the court ruled that Amtrak's claim for further relief was not barred by res judicata because "[t]he issues now before this court * * * were not decided in the prior action over the termination provisions." App. 8a (footnote omitted). The court affirmed the judgment, acknowledging that its "explication of the issues differs in some respects from the trial court's rationale." App. 10a.

REASONS FOR GRANTING THE WRIT

As discussed more fully below, the implications of the Court of Appeals' ruling range far beyond the confines of this case. The courts, including this one, have with good reason gone to extraordinary lengths, in a variety of situations, to compel disputants to settle their differences in one action rather than allow them to litigate piecemeal.[2] But the court below fashioned a new rule that encourages a party to save claims and raise them, even long after judgment, at whatever time advantages that party. In this era of increasing concern over the high cost of litigation, such a new rule has serious consequences—for courts and litigants—because it is almost always more expensive to litigate piecemeal.

Moreover, the court below adopted an extremely broad interpretation of the further relief provision of the Declaratory Judgment Act, transforming what other courts have held to be a limited provision intended to effectuate a declaration of rights into a broad invitation to raise new

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[2] *See, e.g., Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 425 (1923) (" 'It is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal' ") (quoting Justice Story in *Ocean Ins. Co. v. Fields*, 18 F. Cas. 532 (C.C.D. Mass. 1841)); *Nevada v. United States*, 463 U.S. 110, 129 (1983) (" 'the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if * * * conclusiveness did not attend the judgments of such tribunals' ") (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 49 (1897); *MPC, Inc. v. Kenny*, 279 Md. 29, 367 A.2d 486, 490 (1977) ("[t]he public policy against interminable litigation"); *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981) ("The purpose of res judicata is to promote the finality of judgments and thereby increase certainty, discourage multiple litigation, and conserve judicial resources").

issues neither considered nor decided in the prior proceeding. In doing so, the court below construed Section 2202 as an exception to the normal rules governing jurisdiction between the district and appellate courts, despite the long-established understanding that the Declaratory Judgment Act did not affect the jurisdiction of the federal courts in any way.

The lower court's reasoning was not even internally consistent. In deciding that Amtrak's petition sought proper further relief based on the declaratory judgment, the court asserted that the necessary predicate for that relief was established in the prior declaratory proceeding. In deciding that Amtrak's petition was not barred by res judicata, however, the court shifted course and emphasized that the further relief issues "were not decided" in the prior proceeding. App. 8a. "Such Janus-like perceptions" confirm the inherent flaw in the court's analysis, *Spound v. Mohasco Industries, Inc.*, 534 F.2d 404, 408 n.3 (1st Cir.), *cert. denied*, 429 U.S. 886 (1976), and highlight the need for review by this Court.

I. The Declaratory Judgment Act Cannot Expand The Jurisdiction Of The District Court

The District Court's initial declaratory judgment, entered on May 30, 1985, was a final judgment that disposed of all pending matters. There was nothing left for the District Court to decide since there were then no pending motions on file, and the District Court took no steps to retain jurisdiction for any purpose. As a final order disposing of all claims, the District Court's judgment was appealable, and Horn & Hardart filed a notice of appeal to the Court of Appeals.

As this Court held recently, "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985). The final judgment of the District Court in the first round of litigation had disposed of *all* the issues presented to that court, and accordingly the notice of appeal "divest[ed] the district court" of *all* jurisdiction over the case:

> If an appeal is taken from a judgment which determines the entire action, upon the filing of the notice of appeal the district court loses its power to take any further action in the proceeding except in aid of the appeal, to correct clerical mistakes under Fed. R. Civ. P. 60(a), or in aid of execution of a judgment that has not been stayed or superseded. * * * Further proceedings in the district court cannot take place without leave of the court of appeals. [*Henry v. Farmer City State Bank*, 808 F.2d 1228, 1240 (7th Cir. 1986).[3]]

The Court of Appeals never granted such leave in this case. When it affirmed the initial District Court judgment in all respects, the litigation was at an end. No further proceedings were either necessary or contemplated. As Judge Posner noted recently, "[t]he filing of the notice of appeal from a final judgment ordinarily

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[3] *See also Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir. 1984); *Rucker v. U.S. Dept. of Labor*, 798 F.2d 891, 892 (6th Cir. 1986); *Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985); *Garcia v. Burlington Northern R. Co.*, 818 F.2d 713, 721 (10th Cir. 1987).

divests the district court of jurisdiction over the case and shifts it to the court of appeals; anything the district judge does with the case thereafter, *unless and until the case is remanded to him by the court of appeals*, is a nullity." *Matter of Jones*, 768 F.2d 923, 930 (7th Cir. 1985) (concurring) (emphasis supplied). Here there was no remand; the final judgment confirming Amtrak's right to the premises was already fully implemented, since Horn & Hardart had vacated the premises after the initial District Court decision.

As the court noted in *Hunter Douglas Corp. v. Lando Products, Inc.*, 235 F.2d 631, 632-633 (9th Cir. 1956):

> The perfection of the original appeal herein operated to transfer to the Court of Appeals jurisdiction of the cause; the jurisdiction of the trial court ceased and that of the Court of Appeals attached. The trial court was thereafter without authority to act in matters relating to the subject matter until the mandate was returned. In this case the mandate did not authorize the trial court to enter a judgment. *The mandate contemplated no new decree.* Any attempt to do so is void and of no effect. [Emphasis supplied, footnote omitted.]

The District Court judgment was a final decision, "'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Budinich v. Becton Dickinson & Co.*, 56 U.S.L.W. 4453, 4454 (U.S. May 23, 1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). The affirmance by the Court of Appeals of that final decision could not miraculously

resurrect jurisdiction in the District Court, jurisdiction that had been lost when the notice of appeal was filed.[4]

The court below ruled that Section 2202 created an exception to this principle of jurisdiction, noting that "jurisdiction can be 'reserved' by statute" and ruling that "[t]he Declaratory Judgment Act's provision for further relief works such a reservation." App. 4a (quoting *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d at 792). This Court has long held, however, that "the operation of the Declaratory Judgment Act is procedural only," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937), and that the Act did not alter the jurisdiction of the federal courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).[5] If the District Court did not have jurisdiction to consider additional matters after the complete affirmance of its final judgment

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[4] *See, e.g., Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 306 (1948) (Court of Appeals' mandate to enter judgment for plaintiff could not thereafter be enlarged by District Court; only option was to amend Court of Appeals' mandate); *Elias v. Ford Motor Co.*, 734 F.2d 463, 465 (1st Cir. 1984) (where Court of Appeals' affirmance encompassed entire judgment, District Court had no power to increase rate of prejudgment interest); *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789 (7th Cir. 1983) (District Court had no jurisdiction to consider motion for attorneys' fees after affirmance by Court of Appeals of final judgment ended the litigation); *Duane Smelser Roofing Co. v. Armm Consultants, Inc.*, 609 F. Supp. 823 (E.D. Mich. 1985) (court concluded that it had no jurisdiction over action after affirmance by Court of Appeals).

[5] *See Colonial Penn Group, Inc. v. Colonial Deposit Co.*, 834 F.2d 229 (1st Cir. 1987); *Windmoller v. Laguerre*, 284 F. Supp. 563, 564 (D.D.C. 1968) ("the declaratory judgment statute did not enlarge the jurisdiction of the United States District Courts") (Gesell, J.).

disposing of the case, nothing in the Declaratory Judgment Act could remedy that deficiency.[6]

The rule that an affirmance of a final judgment ends the litigation, leaving no further jurisdiction in the District Court, is not a mere technicality. On the contrary, significant policy considerations that go to the heart of the appellate process underly the rule. The very notion of a final decision—the basic predicate to the exercise of appellate review—would be wholly eviscerated if a case could live on after affirmance of what had been supposed to be a final judgment disposing of the case. As Justice Frankfurter noted in a landmark opinion for the Court,

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[6] The authority cited by the court below does not support its contrary conclusion. The quoted passages from Borchard and Anderson, see App. 4a, 5a, view Section 2202 narrowly as reflecting the undisputed principle that courts have inherent power to enforce their decrees and make them effective—a far cry from suggesting that the provision operates to retain jurisdiction in the court to consider *new* claims that do *not* effectuate the prior declaratory judgment. Indeed, Anderson expressly states that "[t]he supplemental relief may be any relief *necessary to make effective* the declaratory judgment * * *," Anderson, *Actions for Declaratory Judgments* § 451 at 1058 (2d ed. 1951) (emphasis supplied), and Borchard similarly refers to the availability of further relief "should the declaration be disobeyed or disregarded." Borchard, *Declaratory Judgments* 441 (2d ed. 1941). Here the declaratory judgment was fully effectuated when Horn & Hardart vacated the premises.

The dicta in *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980), concerned a possible injunction should the government ignore the court's declaratory order—again no support for the broad, open-ended jurisdictional reservation upheld by the court below. *McNally v. American States Ins. Co.*, 339 F.2d 186 (6th Cir. 1964), did not address the juridictional issue, and *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958), did not even involve an intervening appeal affecting the jurisdiction of the District Court.

"[f]inality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick v. United States,* 309 U.S. 323, 324-325 (1940). More recently, this Court unanimously confirmed that the finality rule "is crucial to the efficient administration of justice," *Flanagan v. United States,* 465 U.S. 259, 264 (1984), and that considerations of finality concern " 'very real interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system.' " *Budinich v. Becton Dickinson & Co.,* 56 U.S.L.W. at 4454 (quoting *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 69 (1948)).[7]

Here, of course, there was what appeared to be a final judgment, entered by the District Court on May 30, 1985. It was not until more than two months after the Court of Appeals affirmed that initial "final" judgment that it was learned that there was quite a bit more to the case—as Amtrak saw it—than had met the eye. Permitting a District Court to expand its jurisdiction after affirmance of a final judgment completely disposing of the case would retroactively undermine the finality of the original judgment. What is even more troubling is that neither the District Court nor the Court of Appeals would be able to know—until after the fact—that it was dealing with only fragments of the litigation.[8]

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[7] In *Budinich,* this Court ruled that a decision on the merits was appealable, despite the pendency of a motion for attorneys' fees. The Court did not address the jurisdiction of the District Court to entertain the motion for fees, but it is significant that the motion was filed *before* any notice of appeal divested the District Court of jurisdiction. *See* 56 U.S.L.W. at 4453.

[8] The court below asserted that the District Court "never surrendered" jurisdiction over the liquidated damages and cost

(Continued on following page)

The decision below thus conflicts both with those cases establishing that a notice of appeal divests the District Court of continuing jurisdiction over a matter, and with the well-established principle that the Declaratory Judgment Act does not affect the jurisdiction of the District Courts. Indeed, the entire area of a District Court's jurisdiction after disposition of a case has become subject to conflict and uncertainty. The Circuits are, for example, sharply divided over whether a District Court retains jurisdiction after a voluntary dismissal terminates the litigation,[9] and over whether a District Court may entertain motions based on fee-shifting statutes after an affirmance on appeal.[10] The decision below can only contribute to the uncertainty surrounding the limits on a District Court's authority after that court has been divested of jurisdiction, whether by appeal, dismissal, or otherwise.

(Continued from previous page)

provisions, because those provisions were not involved in the prior appeal. App. 5a. Amtrak's claims based on those provisions, however, were not even raised until after the first appeal, so the District Court could hardly have retained jurisdiction over a non-existent issue. The District Court's initial judgment disposed of the entire case, and that court was divested of jurisdiction over the entire case upon Horn & Hardart's appeal.

[9] *Compare, e.g., Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988) (jurisdiction retained), *and Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987) (same), *petition for cert. dismissed pursuant to S. Ct. Rule 53*, 108 S. Ct. 1101 (1988), *with Santiago v. Victim Services Ag. of the Metro Assistance Corp.*, 753 F.2d 219 (2d Cir. 1985) (no jurisdiction), *Johnson Chemical Co. v. Home Care Products, Inc.*, 823 F.2d 28 (2d Cir. 1987) (same), *and Foss v. Federal Intermediate Credit Bank of St. Paul*, 808 F.2d 657, 660 (8th Cir. 1986) (same).

[10] *Compare, e.g., Hicks v. Southern Maryland Health Systems Ag.*, 805 F.2d 1165, 1166-67 (4th Cir. 1987) (jurisdiction), *with Overnite Transportation Co., supra* (no jurisdiction).

This Court should grant the writ to clarify the appropriate rules on this important question of jurisdiction.

II. Section 2202 Is Limited To Further Relief To Effectuate A Declaratory Judgment, And Does Not Authorize New Claims Raising Issues Not Determined By The Declaratory Judgment

The expansive construction of Section 2202 adopted by the court below is contrary to the more limited interpretation established by other Courts of Appeal, as well as by state courts construing the parallel provision of the Uniform Declaratory Judgment Act. As other courts have recognized, Section 2202 was designed "to effectuate relief based upon the declaratory judgment." *Security Ins. Co. v. White*, 236 F.2d 215, 220 (10th Cir. 1956). Here the court below permitted Section 2202 to be used for a purpose for which it was never intended: to raise new issues neither considered nor determined in the prior declaratory judgment. Amtrak's alleged right to triple rent and attorneys' fees was not determined in the prior declaratory judgment, and its motion for such relief in no way effectuates that judgment. That judgment—establishing Amtrak's right to terminate Horn & Hardart's leasehold—was fully effectuated when Horn & Hardart vacated the premises in response to the District Court's declaration.

As this Court has frequently reiterated, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 2202 authorizes only further relief that is "based on" the declaratory judgment, "against any adverse party whose rights have been determined by such judgment." 28 U.S.C.

§ 2202. Amtrak's claim for liquidated damages and attorneys' fees is not a claim for further relief "based on" the initial declaratory judgment. That Horn & Hardart is liable to Amtrak for triple rent and attorneys' fees does not necessarily follow from the fact that Amtrak had the right to terminate the leases. That is a separate question, turning on the interpretation of separate provisions in the leases, and focusing not on Amtrak's conduct—as did the prior litigation—but on that of Horn & Hardart.

Amtrak conceded that "[t]he prior declaratory judgment did not address the holdover-liquidated-damages or cost-on-default provisions."[11] The court below also acknowledged, in considering Amtrak's petition for further relief, that "[t]he issues now before this court * * * were not decided in the prior action over the termination provisions." App. 8a.[12] Horn & Hardart's "rights" with respect to those provisions therefore could not "have been determined by [the prior declaratory] judgment," and Amtrak's claim for damages is accordingly not "based on" that judgment. 28 U.S.C. § 2202.

Other courts have recognized the more limited scope of the statutory language. Indeed, Section 2202 is typically employed to obtain an injunction when the losing

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[11] Ct. App. Br. at 18. *See also id.* at 12 ("The prior proceedings established that the leases were rightly terminated, but not more").

[12] *See also* App. 5a, reasoning that the District Court did not relinquish jurisdiction over "the leases' liquidated-damages and cost-on-default provisions" because those issues were *not* involved in prior appeal. If those issues were not involved in the prior declaratory proceeding, Amtrak's request for further relief could not have been "based on" the prior declaration of rights.

party refuses to abide by the prior declaratory judgment.[13] Such relief falls under the "necessary" category in Section 2202, and is clearly relief "based on" the prior declaration, against a party whose "rights" were "determined" by that judgment. 28 U.S.C. § 2202.

The court below held that the further relief under Section 2202 "need only be proper." App. 6a. But the statutory limitation that the relief be based on the prior determination of rights is an independent statutory requirement and remains applicable to "proper" as well as "necessary" further relief. Damages may be sought as "further * * * proper relief" only when the declaratory judgment established the right to recover them. In such a case the proper further relief—like the necessary further relief of an injunction to compel compliance with the declaration—effectuates the underlying declaratory judgment.

The court below cited *Besler v. U.S. Department of Agriculture*, 639 F.2d 453 (8th Cir. 1981), but that case confirms Horn & Hardart's argument. There, the Government erroneously paid certain ranchers under a benefit program. The Government demanded repayment, and the

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[13] *See, e.g., Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981) (injunction enjoining state officials from applying provisions declared unconstitutional); *Rincon Band of Mission Indians v. Harris*, 618 F.2d at 575 (referring to possibility of injunction should government not implement declaratory judgment); *Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263 (5th Cir. 1969) (injunction enjoining losing party in prior declaratory judgment from relitigating issue in other courts); *Vermont Structural Slate Co. v. Tatko Bros. Slate Co.*, 253 F.2d 29 (2d Cir. 1958) (injunction enjoining losing party from bringing suit based on claim that patent was valid after declaratory judgment that patent was invalid).

ranchers sought a declaratory judgment and injunctive relief barring collection of the erroneous payments. The ranchers lost, and the Government subsequently moved under 28 U.S.C. § 2202 to recover the payments. The Court of Appeals held that the Government's motion should have been granted. The court noted that the ranchers "refused to comply with the declaratory judgment" and were "attempting to avoid repayment of funds that are *admittedly due* the government." *Id.* at 455 (emphasis supplied). The Government was entitled to the further relief it sought because "[t]he declaratory judgment previously entered by the district court *conclusively established* the government's right to recoup the benefits received by the [ranchers]." *Id.* (emphasis supplied).

The present case is quite different. Horn & Hardart *has* complied with the declaratory judgment. That judgment established Amtrak's right to terminate the leases, and Horn & Hardart vacated the premises shortly after the District Court's decision. The damages Amtrak sought as "further relief" were certainly not "admittedly due" on the basis of that prior judgment—Horn & Hardart vigorously disputes Amtrak's entitlement on the merits to the relief it seeks. In *Besler*, the declaratory judgment established that the Government could recover the monies erroneously paid, and thus further relief to do precisely that was "proper." Here the declaratory judgment did *not* "conclusively establish" Amtrak's right to liquidated damages or attorneys' fees—the issue was never raised, litigated, or decided, and the fact that Amtrak had the

right to terminate the leases did not establish any right to damages or fees for holdover or default.[14]

The statute at issue here was modeled on the Uniform Declaratory Judgment Act, and it has long been recognized that "the Uniform Declaratory Judgment Act affords a guide to the scope and function of the federal act." Advisory Committee Note, Fed. R. Civ. P. 57.[15] Cases decided under the Uniform Act clearly recognize that the "further relief" provision embraces only relief that effectuates the prior declaratory judgment. In *Oklahoma Alcoholic Beverage Control Board v. Central Liquor Co.*, 421 P.2d 244 (Okla. 1966), for example, the court held that an action concerning a state liquor board's authority over price discounts could *not* be considered "further relief" based on a prior ruling concerning the board's regulation

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[14] The only other case cited by the court below for its expansive notion of "proper" relief under Section 2202 was *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co., supra*. In that case, however, the entitlement to damages for infringement was established by the prior declaration that plaintiff, and not defendant, owned the copyrights at issue. Here the declaration that Amtrak could terminate the leases did not establish any entitlement to damages or attorneys' fees for wrongful holdover or default. In any event, the court in *Edward B. Marks* expressly noted that "further relief" had in fact been requested *in the original complaint*. 255 F.2d at 522-523. Here of course Amtrak did not request its "further relief" until well over one year after judgment by the District Court, and more than two months after the affirmance of that judgment by the Court of Appeals.

[15] *See* S. Rep. No. 1005, 73d Cong., 2d Sess. 4-5 (1934). *See also* 6A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 57.10, at 57-77 (1987) ("Section 2202 is essentially the same as § 8 of the Uniform Declaratory Judgments Act, and hence decisions under the latter section are in point").

of prices. The court held that the further relief provision "was not intended to give the court continuing jurisdiction to resolve subsequent disputes between the parties over matters not involved in the original litigation." *Id.* at 247. Since the discount issue—like the issue of Amtrak's right to liquidated damages and attorneys' fees—"was not presented by the pleadings nor considered by the court," the trial court lacked jurisdiction to consider it on an application for "further relief." *Id.*[16]

The decision below thus conflicts with both federal and state cases construing the further relief provision as limited to further relief to effectuate the underlying declaratory judgment. As those cases demonstrate, the provision was designed as a limited supplement to give needed force to declaratory judgments, not as a broad license to raise new claims or expand the scope of the issues previously considered. This is evident from the loose procedural safeguards in the statute. Section 2202 specifies only that there be "reasonable notice and hearing" prior to the award of further relief; the elaborate and precise procedures surrounding the commencement and defense

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[16] *See also Shadid v. Oklahoma Alcoholic Beverage Control Board*, 639 P.2d 1239, 1242 (Okla. 1982) (further relief provision applicable whenever further relief is "necessary to effectuate the declaratory judgment"); *State Farm Mutual Auto Ins. Co. v. Mohan*, 85 Ill. App. 2d 10, 228 N.E.2d 283, 290 (1967) ("It is clear that the statute contemplates further relief based on the rights determined and does not purport to include relief with respect to issues not resolved by the declaration of rights"); *United Services Auto. Ass'n v. Pons*, 383 So. 2d 166, 169 (Civ. App. Ala. 1979) (further relief provision "authorizes a court to grant such relief as is necessary to effectuate the declaratory judgment"); *Morris v. Ellis*, 221 Wis. 307, 266 N.W. 921, 924 (1936) (supplemental relief "includes any relief essential to making effective the declaratory judgment entered by the court").

of litigation are notably absent. The reason is clear: the provision only authorizes further relief "based on" a declaratory judgment against a party "whose rights have been determined by such judgment." Since the issues have already been determined, with the normal safeguards of litigation, the further relief can be awarded without any ado.

Such an expeditious procedure raises serious due process concerns, however, when the further relief is—as here—a new claim which has *not* been determined by the prior judgment. In such a case the adverse party is entitled to the normal protections surrounding the raising of new claims, and the summary procedure of Section 2202 cannot be invoked. Section 2202 was not intended as a substitute for the normal processes of litigation, and construing it as such poses serious constitutional problems.

As interpreted below, Section 2202 is an open-ended invitation to litigants who have prevailed in declaratory judgment actions to return to court whenever they happen to be reminded of other claims they might have against the other party.[17] Even worse, it is an invitation deliberately to partition a case, to divide it into segments so as to maximize the advantages that sometimes flow to litigants from piecemeal adjudication. The right to prevail on the new claims need not have been decided or even raised in the prior proceeding; it is apparently enough that the prior declaration form a logical step in a progression justifying the relief.

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[17] *See Arizona v. California*, 460 U.S. 605, 625 (1983) ("the urge to relitigate, once loosed, will not be easily cabined").

Thus, a declaratory judgment that one party signed a contract could be a predicate to the further and previously unsought relief of damages for breach of contract; a declaratory judgment that one party published certain statements could be a predicate to damages for libel. Expanding the scope of Section 2202 to encompass claims and issues beyond those that effectuate the underlying judgment would seriously distort the litigation process. Litigants and judges would be asked to confront cases with only fragments—perhaps carefully crafted fragments—before them, when seeing the whole picture might well affect the deliberations and result.

III. Section 2202 Does Not Authorize Amtrak's Claim-Splitting, And The Contrary Decision Below Is In Conflict With Established Principles Of Res Judicata

It was undisputed below that the usual prerequisites for application of res judicata were satisfied in this case: the first adjudication was a final judgment, the parties were the same, the court issuing the original decision was of competent jurisdiction, and the claims were based on the same cause of action previously decided. *See* App. 23a-24a. The District Court recognized that "if applicable, traditional res judicata bars Amtrak's petition for further relief." App. 24a.

The court below relied upon the so-called "declaratory judgment exception to claim preclusion doctrine" to permit Amtrak to raise its claim for further relief long after initial adjudication in the District Court, and after affirmance of that decision in the Court of Appeals. App. 7a. This "exception," however, applies when the initial proceeding involves only claims for declaratory relief. The

District Court itself recognized that "mechanical application" of the exception, as set forth in the *Restatement (Second) of Judgments*, "would result in barring Amtrak's petition." App. 24a-25a. Indeed, even as articulated by the court below, the exception is not applicable. That court stated: "Where a party asks only for declaratory relief, courts have limited the preclusive effect to the matters declared, hence permitting a later action seeking coercive relief based on the same cause of action." App. 7a. Here, of course, Horn & Hardart did not ask "only for declaratory relief," but for an injunction and damages as well. In such a case, normal rules of preclusion should apply.

The court below extended the declaratory judgment exception to cover Amtrak's petition because Amtrak, according to the court, did not assert and was not required to assert a counterclaim in the initial declaratory judgment action. This expansion of the exception or, as the District Court put it, this "special treatment" for Amtrak, App. 25a, was unwarranted.[18] A declaratory judgment action blurs the distinction between plaintiff and defendant, seeking a judicial determination of the respective rights and liabilities of two adverse parties before the court. One of the major reasons Congress passed the Declaratory Judgment Act was to permit potential defendants—like Horn & Hardart—to repair to court as plaintiffs for an adjudication of the underlying controversy. *See* S. Rep. No. 1005,

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[18] This Court has previously noted its opposition to such *ad hoc* exceptions to the rules of res judicata, stating that justice "is achieved when a complex body of law developed over a period of years is evenhandedly applied." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

73d Cong., 2d Sess. 2-3 (1934); H.R. Rep. No. 1264, 73d Cong., 2d Sess. 2 (1934). Indeed, in considering whether it has jurisdiction over a declaratory judgment action, a federal court must often realign plaintiff and defendant, and look to the action the nominal defendant would bring. *See Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 & n. 9 (1983).

In the declaratory judgment area the argument that the nominal defendant has not sought any relief because he has not filed an answer is unwarranted. Amtrak did in fact press claims and seek affirmative relief in the prior proceeding, urging the District Court to "enter a judgment declaring that Amtrak has the right to terminate the leases in question because the demised premises are required for 'corporate purposes' and/or because the premises are needed in connection with the 'proposed reconstruction' of the terminal."[19]

Amtrak obtained the relief it sought—a final summary judgment establishing the correctness of its interpretation of the leases and its right to terminate them. It could have obtained more relief upon entry of the judgment, whether it had asked for it or not.[20] Indeed, Amtrak

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[19] Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment at 18 (April 19, 1985).

[20] Fed. R. Civ. P. 54(c) specifies that "[e]xcept as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

cannot dispute that it sought and obtained relief in the original declaratory judgment action, because the provision on which it now relies—28 U.S.C. § 2202—only authorizes "[*f*]*urther* necessary or proper relief."

This new exception to the normal rules of res judicata, if embraced by this Court, would go far to undermine the efficacy of the declaratory judgment process itself. It is well established that the decision to grant or withhold declaratory relief is discretionary with the trial court,[21] and "[o]ne of the most important considerations that may induce a court to deny declaratory relief is that the judgment sought would not settle the controversy between the parties."[22] On this point the otherwise scant legislative history of the Declaratory Judgment Act is unambiguous. According to the Report of the Senate Judiciary Committee, "[t]he court has a discretion * * * not to issue the judgment if it will not finally settle the rights of the parties," and "the decision must finally settle and determine the controversy." S. Rep. No. 1005, 73d Cong., 2d Sess. 5, 6 (1934). As the Report concluded:

> An important practical advantage of the declaratory judgment lies in the fact that it enables litigants to narrow the issue, speed the decision, and settle the controversy before an accumulation of differences and hostility has engendered a wide and general conflict, involving numerous collateral issues. [*Id.* at 3.]

See also Advisory Committee Note, Fed. R. Civ. P. 57 ("declaratory judgment is appropriate when it will 'terminate the controversy' giving rise to the proceeding").

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[21] *See Zemel v. Rusk*, 381 U.S. 1, (1965); *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 494 (1942).

[22] 10A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2759, at 648 (1983).

Under the rule announced for the first time below,[23] however, a court could never know whether its declaratory judgment would or would not "finally settle and determine the controversy" between the parties. S. Rep. No. 1005, *supra,* at 6. If a party whose rights are being declared can withhold from resolution significant claims arising out of the same transaction, the court could never be confident that its declaration would finally put the controversy to rest. Applying the normal rules of res judicata to require that all claims arising out of the same transaction be raised before judgment—upon pain of having them barred when raised thereafter—ensures that the District Court can properly exercise informed discretion as to the propriety of declaratory relief in the first place. Only if the court knows all the claims and issues can it decide if its judgment would resolve them.

Here Amtrak's decision to split its claims yielded a declaration of rights that did *not* finally resolve the legal disputes between Amtrak and Horn & Hardart, even though the courts below could well have thought, at the time, that it did. The purpose of preclusion rules is to avoid such surprises.

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[23] The District Court recognized that this is "the first federal case to confront directly the issue." App. 25a.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7087

HORN & HARDART COMPANY, APPELLANT

V.

NATIONAL RAIL PASSENGER CORPORATION

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 85-00820)

Argued February 9, 1988
Decided April 8, 1988

John G. Roberts, Jr., with whom *Peter F. Rousselot* and *Allen R. Snyder* were on the brief, for appellant.

Charles F. Lettow, with whom *Matthew D. Slater* was on the brief, for appellee.

Before: WALD, *Chief Judge*, STARR and WILLIAMS, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* WALD.

WALD, *Chief Judge:* Appellant Horn & Hardart Company (Horn & Hardart) seeks review of a district court decision granting a motion by appellee National Railroad Passenger Corporation (Amtrak) for "further relief"

under the Declaratory Judgment Act.[1] Specifically, the district court enforced liquidated-damages and cost-on-default contract provisions against Horn & Hardart, the lessee of restaurant space in Amtrak's Pennsylvania Station in New York City.[2]

Horn & Hardart, a Nevada corporation involved in the food services industry, entered into three leases with Amtrak on June 1, 1980, for restaurant space in Pennsylvania Station, New York City. On November 29, 1984, Amtrak informed Horn & Hardart that it intended to terminate all three leases pursuant to provisions that authorized such termination when corporate or construc-

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[1]Section 2202 reads:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2202.

[2]The end-of-term holdover clauses concerning liquidated damages uniformly provide:

> Lessee . . . agrees that if possession of the demised premises is not surrendered to the Lessor within seven days of the date of expiration or sooner termination of the term of this lease, then Lessee agrees to pay Lessor as liquidated damages for each month and for each portion of any month during which Lessee holds over in the premises after expiration or termination of the term of this lease, a sum equal to three times the average rent and additional rent which was payable per month under this lease during the last six months of the term hereof.

See Horn & Hardart Co. v. National Railroad Passenger Corp., 659 F.Supp. 1258, 1266-67 (D.D.C. 1987) (emphasis omitted).

The leases also included provisions that required Horn & Hardart to pay costs and expenses, including attorneys' fees, suffered by Amtrak because of a " 'default in the observance or performance of any term or covenant on Lessee's part. . . . ' " *Id.* at 1268 (emphasis omitted).

tion purposes so required, and demanded that Horn & Hardart vacate the premises by February 28, 1985. Instead, Horn & Hardart instituted an action based on the Declaratory Judgment Act seeking a ruling that the terminations violated the lease provisions. Horn & Hardart also sought an injunction against Amtrak's seeking an eviction as well as $2.5 million in damages for losses suffered by Horn & Hardart as a result of Amtrak's actions. This action, based on an alleged failure of Amtrak to abide by the notice of termination clauses, was unsuccessful. First, the district court, *see Horn & Hardart Co. v. National Railroad Passenger Corp.*, No. 85-0820, mem. op. (D.D.C. May 30, 1985) *(Horn & Hardart I)*, then this court, *see Horn & Hardart Co. v. National Railroad Passenger Corp.*, 793 F.2d 356 (D.C. Cir. 1986) *(affirming Horn & Hardart I)*, upheld Amtrak's legal right to terminate the leases. Simultaneously, Amtrak took actions in New York courts to regain possession. Horn & Hardart vacated the properties on August 5, 1985. That same month, Amtrak paid Horn & Hardart $180,000 in compensation for the early termination pursuant to a cancellation-premium clause, and, on August 19, 1986, Amtrak brought the present action for "further relief" under § 2202 of the Declaratory Judgment Act.

The district court, relying on § 2202, enforced the leases' end-of-term holdover and cost-on-default clauses, and awarded Amtrak $335,017.30 in damages and $52,562.02 in attorney's fees. *Horn & Hardart Co. v. National Railroad Passenger Corp.*, 659 F. Supp. 1258 (D.D.C. 1987) *(Horn & Hardart II)*. Horn & Hardart raises four objections to this result. Because all four

objections are unavailing, we affirm the district court's order.

A. *Jurisdiction*

First, appellant-Horn & Hardart's argument that the district court lost jurisdiction once its initial judgment was appealed to this court is mistaken. The "further relief" provisions of both state and federal declaratory judgment statutes clearly anticipate ancillary or subsequent coercion to make an original declaratory judgment effective.[3] Neither a completed appeal, *see McNally v. American States Insurance Co.*, 339 F.2d 186, 187, 188 (6th Cir. 1964) (per curiam), nor a considerable period of delay after the trial court ruling, *see Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958), terminates this authority. Section 2202's retained authority, commentators have noted, "merely carries out the principle that every court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective." Borchard, Declaratory Judgments 441 (2d ed. 1941); *see also Rincon Band of Mission Indians v. Harris*, 618

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[3]Horn & Hardart's reliance on Overnite Transportation Co. v. Chicago Industrial Tire Co., 697 F.2d 789 (7th Cir. 1983), albeit misplaced, is instructive. Though *Overnite* states the general rule that an appeal divests a district court of jurisdiction, the court qualifies this rule by recognizing that jurisdiction can be "reserved" by statute. *Id.* at 792. The Declaratory Judgment Act's provision for further relief works such a reservation. *See* Borchard, Declaratory Judgments 439 (2d ed. 1941).

F.2d 569, 575 (9th Cir. 1980).[4] To rule otherwise would allow the party against whom a declaratory judgment is rendered to nullify her adversary's right to § 2202 relief merely by lodging an appeal. Indeed, such a forfeiture rule would conflict not only with common sense, but also with the principle that when a party files a notice of appeal the district court only surrenders "its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). This court expressly confined its earlier inquiry to "whether the trial court erred in its interpretation of termination provisions contained in three 1980 leases between Amtrak . . . and [Horn & Hardart]." 793 F.2d at 356. The district court, therefore, never surrendered jurisdiction over the leases' liquidated-damages and cost-on-default provisions now on appeal.

B. *The Declaratory Judgment Act*

Section 2202 of the Declaratory Judgment Act provides for "necessary or *proper* relief"—specifically, "proper relief *based* on the declaratory judgment." 28

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[4]*See also* Anderson, Actions for Declaratory Judgments § 451 (2d ed. 1951 & Supp. 1959). Anderson writes:

> While it is true that the declaratory judgment statute does not authorize the retention by the court of any jurisdiction after entertaining a declaratory judgment, yet it does not follow that a court may not retain jurisdiction to enter such subsequent orders that will make effective the declaratory judgment that has been granted. The power of the court of equity to retain jurisdiction to give complete and effectual relief is well established, and it follows without any serious controversy that the court may make such further orders to give effect to a declaratory judgment as shall seem meet and proper.

Id. at 1058.

U.S.C. § 2202 (emphasis added). Amtrak's request for further relief in the form of triple rent and attorneys' fees follows absolutely from, and is based on, the district court's decision in *Horn & Hardart I* confirming Amtrak's right to terminate the leasehold.[5] And even though Amtrak's present request may not be "necessary" to effectuate the lease termination ruling, the plain language of the Declaratory Judgment Act does not require this degree of stringency. The relief need only be proper. *See, e.g., Besler v. United States Dept. of Agriculture,* 639 F.2d 453, 454-55 (8th Cir. 1981); *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.,* 255 F.2d 518, 522 (2d Cir.), *cert. denied,* 358 U.S. 831 (1958) (damages for infringement of copyright awarded to supplement declaratory judgment as to ownership, even though damages were not asserted in complaint). Further relief is certainly proper in this case because the leasehold arrangement between Amtrak and Horn & Hardart specified that a valid notice of termination was the only factual and legal predicate necessary for recovery of liquidated damages and costs.

C. *Res Judicata*

The district court properly rejected Horn & Hardart's third objection that Amtrak's claims for further relief are barred by *res judicata* doctrine. It ruled that ordinary principles of claim preclusion do not apply to § 2202 actions given their clear purpose of supplementing declaratory relief. *See, e.g., Kaspar Wire Works, Inc. v.*

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[5]We note that were the subsequent action for § 2202 further relief to occur unfairly late, suit might be barred by the doctrine of laches. No such concern exists in the present case.

Leco Engineering & Mach., Inc., 575 F.2d 530, 534-40 (5th Cir. 1978); *Alexander & Alexander, Inc. v. Van Impe*, 787 F.2d 163, 166 (3d Cir. 1986) (dictum). In turn, this logic rests on the declaratory judgment exception to claim preclusion doctrine. *See* Restatement (Second) of Judgments § 33 (1982); *see also Mandarino v. Pollard*, 718 F.2d 845, 847, 848 (7th Cir. 1983) (dictum), *cert. denied*, 469 U.S. 830 (1984). Where a party asks only for declaratory relief, courts have limited the preclusive effect to the matters declared, hence permitting a later action seeking coercive relief based on the same cause of action. Indeed, the very language of § 2202 indicates that the prevailing party in a declaratory judgment may seek further relief in the form of damages or an injunction. *Powell v. McCormack*, 395 U.S. 486, 499 (1969); *see also Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518, 522 (2d Cir. 1958), *cert. denied*, 358 U.S. 831; Annot., 10 A.L.R.2d 782, 787 (1950) (citing cases). Federal and state cases, moreover, have utilized § 2202, or its state counterparts, to award damages at a later date to parties who have earlier succeeded at the declaratory judgment stage. *See, e.g., Security Mutual Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062, 1066 (10th Cir. 1980); *Farley v. Missouri Dept. of Natural Resources*, 592 S.W.2d 539, 541 (Mo. App. 1979).

Horn & Hardart attempts to rebut reliance on the declaratory judgment exception to claim preclusion with the observation that where a plaintiff's original action seeks corecive or injunctive, as well as declaratory, relief, traditional rules of claim preclusion may apply to bar later actions. This bar could only affect Amtrak, how-

ever, had it filed an answer, thereby making its own counterclaims ripe. In this case, Rule 13(a)'s compulsory counterclaim requirement never became relevant.[6] For a counterclaim to be compulsory, Amtrak would have to have been obliged to submit responsive pleadings, *see* Restatement (Second) of Judgments § 21 (defendant who prevails on counterclaim is treated as plaintiff and rules of merger apply). Instead, Amtrak merely filed a motion to dismiss, which under Fed. R. Civ. P. 12(b)(6) is not such a responsive pleading. Summary disposition was entered before Amtrak was required to submit an answer. *See United States v. Snider*, 779 F.2d 1151, 1157 (6th Cir. 1985) (no bar to second suit where motion to dismiss settled earlier case without pleadings). Where a defendant neither asserts, nor is required to assert, a counterclaim, Restatement (Second) of Judgments § 22 explains that the previously unlitigated issues will not later be estopped by the earlier action. *See, e.g., County Fuel Co. v. Equitable Bank Corp.*, 832 F.2d 290, 292 (4th Cir. 1987). The issues now before this court, we have noted, were not decided in the prior action over the termination provisions.[7]

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[6]Because Rule 13 did not become timely, we do not consider the possibility that § 2202's provision for supplementary relief might actually enlarge the declaratory judgment exception to claim preclusion to permit a supplemental action even where the original action involved more than decalatory relief. *Cf.* Edward B. Marks Music Corp. v. Charles K. Harris Music Corp., 255 F.2d 518 (2d Cir.) (court awards § 2202 further relief even though original claim includes injunctive relief request—no discussion of claim preclusion), *cert. denied*, 358 U.S. 831 (1958).

[7]Indeed, § 2202's post-judgment relief need not be demanded, or even proved, in the original action. *See* Edwards B. Marks Music Corp. v. Charles K. Harris Music Publishing Co., 255 F.2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958).

D. *Merits*

Reaching the merits, we find that the plain and straight-forward language of the leases controls. The leases stated that because Amtrak would incur considerable costs if Horn & Hardart failed to vacate upon notice of termination, *see Horn & Hardart II*, 659 F. Supp. at 1266 (liquidated damages provisions), Horn & Hardart, in the event of a holdover, would be liable for both attorneys' fees and three times its average monthly rent.[8] District of Columbia law, which governs Amtrak contracts, holds that such liquidated-damages clauses are valid and enforceable. *See, e.g., Vicki Bagley Realty, Inc. v. Laufer*, 482 A.2d 359, 368 (D.C. 1984). Horn & Hardart's disagreement with this result rests on an alleged "well-established principle that holdover sanctions should not apply to those remaining on the premises on the basis of a reasonable, good faith understanding of their legal rights." *See* Brief for Appellant at 12. To be sure, parties may negotiate to include a bad faith requirement before a liquidated damages forfeiture will ensue. However, these leases do not contain any such requirement; nor does District of Columbia law require that default be in bad faith before liquidated damages or attorneys' fees may be compelled. *See Burns v. Han-*

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[8]Amtrak's twin claims for triple rent damages and attorneys' fees are based on the leases' clauses cited in note 2, *supra*. Because both claims involve sums that have a reasonable relation to the probable damages Amtrak incurred from Horn & Hardart's holdover, these automatic forfeitures do not constitute a penalty which would be invalid under Burns v. Hanover Insurance Co., 454 A.2d 325, 327 (D.C. 1982). The district court's conclusion that the sums did not act as a penalty, *see Horn & Hardart II*, 659 F. Supp. at 1266, is not contested by either party.

over Insurance Co., 454 A.2d 325, 327 (D.C. 1982) (parties may agree in advance the sum to be forfeited as liquidated damages unless amount is shown to be penalty); *Hagans Management Co. v. Nichols*, 409 A.2d 179, 182 (D.C. 1979) (lease provision for payment of attorneys' fees on default upheld).

We conclude that Horn & Hardart cannot escape its contractual obligations, which Amtrak now seeks to pursue under § 2202. Appeal from an adverse declaratory judgment does not erect a jurisdictional bar to further relief in the district court based on the original judgment, nor does the doctrine of claim preclusion bar a valid § 2202 "further relief" action in the circumstances of this case where the defendant was never required to assert counterclaims in the original suit. Although our explication of the issues differs in some respects from the trial court's rationale, we agree with the district court that none of Horn & Hardart's procedural or substantive arguments will permit that corporation to escape its contractual liability to Amtrak.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7087 September Term, 1987
D.C. Civil No. 85-0820

Horn & Hardart Company,

Appellant

v.

National Rail Passenger Corporation

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Before: Wald, Chief Judge; Starr and Williams, Circuit Judges

JUDGMENT

(Filed April 8, 1988)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ Constance L. Dupre
Clerk

Date: April 8, 1988
Opinion for the Court filed by Chief Judge Wald

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HORN & HARDART COMPANY,	)	
Plaintiff,	)	
v.	)	Civil Action
NATIONAL RAILROAD PASSENGER CORPORATION,	)	No. 85-0820
Defendant.	)	

COUNSEL: For Horn & Hardart [respondent]: Peter Rousselot, Washington, D.C.

For Amtrak [petitioner]: John C. Morland, Washington, D.C.

MEMORANDUM

I. INTRODUCTION

In *Horn & Hardart Co. v. Nat'l R.R. Passenger Corp.*, Civil Action No. 85-0820 (D.D.C. May 30, 1985) (*"Horn & Hardart I"*), *aff'd*, 793 F.2d 356 (D.C. Cir. 1986), this Court held that, pursuant to certain contracts, National Railroad Passenger Corporation ("Amtrak" or "the Railroad") had the right to terminate three restaurant leases of The Horn & Hardart Company ("Horn & Hardart" or "the Company") at the Pennsylvania Station ("Penn Station") in New York.[1] Accordingly, the Court denied plaintiff Horn & Hardart's request for (1) a declaratory

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[1]The facts relevant to this holding are fully discussed in *Horn & Hardart I* and will not be reiterated here.

judgment that Amtrak's attempted termination of the leases was unlawful; (2) an injunction preventing Amtrak from attempting to oust Horn & Hardart from the premises; and (3) an award of damages of not less than $2.5 million.

In the wake of *Horn & Hardart I's* affirmance on appeal, Amtrak, the original defendant, took the initiative and filed a petition for an award of "further relief" against Horn & Hardart pursuant to 28 U.S.C. § 2202.[2] On the basis of certain provisions in the operative leases, Amtrak alleges that it is entitled to recover damages for Horn & Hardart's hold-over at Penn Station during the litigation of *Horn & Hardart I* and for attorney fees and court costs arising out of Horn & Hardart's decision to hold-over. For reasons provided hereafter, the Court grants Amtrak much of the relief it requests.

II. BACKGROUND

Few facts are necessary to evaluate Amtrak's petition. On November 29, 1984, Amtrak transmitted three notices to Horn & Hardart instructing the Company that its three Penn Station leases would terminate after 90 days. Despite this notice, Horn & Hardart did not vacate its leaseholds. Instead, the Company initiated *Horn & Hardart I* in an effort to demonstrate that Amtrak's termination was improper.

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[2]Section 2202 provides as follows:

> [f]urther necessary *or proper* relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against *any adverse party* whose rights have been determined by such judgment.

28 U.S.C. § 2202 (emphasis added).

Nearly three months later, on May 30, 1985, this Court upheld Amtrak's position. *See Horn & Hardart I* at 9. Notwithstanding that ruling, Amtrak had to prosecute three consolidated actions in New York landlord-tenant court over a two-month period to recover its properties. *See National Railroad Passenger Corporation v. The Horn & Hardart Co.*, L and T Index Nos. 36876/85, 36877/85, 36878/85 (N.Y. Civ. Ct., Part 52) (Petitioner's Opposition to Respondent's Motion to Dismiss at Exhibit A). Consequently, on August 5, 1985, Horn & Hardart vacated the Penn Station premises. Upon departure, in compliance with a liquidated damage provision in the lease, Amtrak paid Horn & Hardart $180,000 to compensate the Company for losses occasioned by Amtrak's early termination of the leases. *Id.; see Horn & Hardart Co. v. Nat'l R.R. Passenger Corp.*, 793 F.2d 356, 360 (D.C. Cir. 1986). It is noteworthy that, during the five-month hold-over period, Horn & Hardart also continued to profit from its food concessions at Penn Station.

III. HORN & HARDART'S MOTION TO DISMISS

Before considering Amtrak's request for damages, the Court first addresses the jurisdictional, procedural and substantive arguments raised by Horn & Hardart to block disposition of this matter on the merits.

A. *Jurisdiction*

Horn & Hardart first challenges the jurisdiction of this Court. Respondent founds its argument on an alleged procedural defect. After this Court rejected Horn & Hardart's original claims, the Company appealed the decision to the Court of Appeals for this Circuit. Horn & Hardart correctly maintains that its notice of appeal di-

vested this Court of jurisdiction over "those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). From this premise, the respondent concludes that "[t]he Court of Appeals' June 17, 1986 affirmance of this Court's judgment resolved all outstanding issues in this proceeding, leaving nothing for this Court to decide." Respondent's Motion to Dismiss at 6. The Court finds this conclusion unsubstantiated and erroneous.

It is irrefutable that an appellate mandate is completely controlling as to all matters decided and disposed of by the decree. *See Elias v. Ford Motor Co.*, 734 F.2d 463, 465 (1st Cir. 1984); I. B. J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[10] (2d ed. 1983). A district court obviously cannot flaunt matters addressed by an appellate mandate. *See Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948). Those cases cited by the respondent illustrate only this principle; each involved a lower court's attempt to enlarge a specific appellate mandate by increasing the amount of judgment the mandate specified. *See, e.g., Elias, supra,* 734 F.2d at 465 (attempt by district court to modify amount of appellate award by adding prejudgment interest). No case cited by respondent addresses a situation comparable to the one in this case, where the appellate mandate is silent as to matters addressed to the District Court after the conclusion of appellate review and a federal statute contemplates a return to the District Court.

The Court concludes that where there is statutory authority to return to the district court, and jurisdiction would otherwise be proper, litigation secondary to the original may proceed even though an appellate mandate

does not expressly grant jurisdiction.[3] Section 2202 of the Declaratory Judgments Act expressly provides for "further relief." 28 U.S.C. § 2202, *supra*, at note 2. This provision has been interpreted as providing for "supplemental" relief which may be granted in a proceeding subsequent to the original. Borchard, *Declaratory Judgments* 438-41 (2d ed. 1941). As such, courts have routinely allowed separate proceedings for further relief in the District Court which heard the original case even though an appellate court has rendered a decision upholding the judgment in the interim. In *McNally v. Am. States Ins. Co.*, 339 F.2d 186 (6th Cir. 1964), the plaintiffs instituted an action for declaratory judgment against their insurance carrier to ascertain the extent of their liability in actions brought against them by certain third parties. The District Court held that the policy wholly insured the plaintiffs. That judgment was affirmed on appeal. Thereafter, the plaintiffs returned to the District Court and filed a "Petition for Further Relief" pursuant to 28 U.S.C. § 2202. The Sixth Circuit affirmed the propriety of this procedure. *Id.* at 187; *see Valley Oil Co. v. Garland*, 499 S.W.2d 333 (Tex. Civ. App. 1973); *see also McCann v. Kerner*, 436 F.2d 1342, 1343 (7th Cir. 1971) (section 2202 "contemplates that subsequent to the issuance of a declaratory judgment, a court may [grant further relief]").[4]

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[3]In this case, there is diversity of citizenship, 28 U.S.C. § 1332

[4]To rebut Amtrak's reliance on section 2202, Horn & Hardart principally relies on *Peterson v. Lindner*, 765 F.2d 698, 703 (7th Cir. 1985). That case, however, is inapt. *Lindner* addressed a wholly different question: whether a declaratory

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This Court agrees with the uncontradicted line of cases holding that section 2202 actions for further relief may be initiated after an appeal of the original action. There was no way the appellate mandate could provide for Amtrak's decision to seek further relief since that decision did not become full-blown until after the mandate had issued. Moreover, it would be in incongruous for district courts to have the absolute right to hear petitions for further relief when no appeal is lodged but no right after an appeal unless expressly granted by an appellate court. On the basis of the foregoing, the Court finds jurisdiction proper.

B. *Scope of Section 2202*

Horn & Hardart's second concern is with the reach of section 2202. The respondent concedes that "further relief" embraces coercive remedies like damages. *See* Borchard, *supra,* at 441. However, Horn & Hardart argues that any damages "must in fact be 'further relief' which is 'based on' the declaratory judgment—an alternative form of relief to which the litigant has already proved his entitlement in the declaratory judgment action." Respondent's Motion to Dismiss at 10 (citing 28 U.S.C. § 2202).

Respondent's construction of section 2202 is unduly narrow and does not state the law of the federal courts.

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judgment issued pursuant to 28 U.S.C. § 2201 constitutes a "final judgment" for purposes of immediate appeal under 28 U.S.C. § 1291. *Lindner* thus concerns the appealability of a declaratory judgment in the first instance, not the effect of an appeal on the propriety of using section 2202 in the court which originally heard the case.

Section 2202 expressly provides that "further relief" must be "based on" a declaratory judgment. Respondent construes the words "based on" to mean that further relief is only appropriate *to effect* a declaratory judgment. A few state courts have so held. In *Oklahoma Alcohol Beverage Control Bd. v. Central Liquor Co.*, 421 P.2d 244 (Okla. 1966), the Court held that the Oklahoma Declaratory Judgment Act, which tracks the Uniform Declaratory Judgments Act, 9A Uniform Laws Annotated 1, only authorizes "further relief" "wherever such relief becomes *necessary in order to effectuate* the declaratory judgment." *Central Liquor Co., supra,* 421 P.2d at 247 (emphasis added). *See also State Farm Mutual Auto Ins. Co. v. Mohan,* 85 Ill. App. 2d 10, 228 N.E.2d 283, 290 (Ill. App. Ct. 1967) (the Illinois Declaratory Judgments Act "contemplates further relief based on the rights determined [in the earlier declaratory judgment proceeding]").

State precedent is, of course, not binding on this Court. Moreover, the cases relied upon by Horn & Hardart are not persuasive since neither bothers to closely read the language of their respective declaratory judgments statutes. Further relief, based on the original declaratory judgment, may be granted wherever it is either "necessary *or proper.*" 28 U.S.C. § 2202 (emphasis added). Propriety is of course a broader concept than necessity. In consideration of this language, the requirement that a plea for further relief must be "based on" the declaratory judgment should be broadly read. In *Edward B. Marks M. Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518 (2d Cir.), *cert. denied,* 358 U.S. 831 (1958), the Second Circuit held that a plaintiff who had initiated a

declaratory judgment action to establish ownership rights in certain copyrights could thereafter petition for further relief pursuant to section 2202 for an adjudication of infringement and an accounting. *Id.* at 520, 522. Likewise, Amtrak's present claims for damages flow directly from the judgment of this Court. The Court finds it both proper and efficient for Amtrak to prosecute its claims in a petition for further relief. Having decided the action upon which Amtrak's petition is founded, the Court is familiar with the case. To force Amtrak to initiate a new lawsuit which might be heard by a different court would be wasteful of judicial resources.

C. *Timeliness*

Horn & Hardart's third contention is that Amtrak's request for further relief is time barred by Federal Rule of Civil Procedure ("Rule") 59(e). That Rule states, "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e).

In support of its position, respondent cites to numerous cases holding that attorney fees, recovery for which is integral to the merits of a case, must satisfy the requirements of Rule 59(e). *See, e.g., Hairline Creations, Inc. v. Kefalas,* 664 F.2d 652, 660 (7th Cir. 1981); *Hooper v. FDIC,* 785 F.2d 1228, 1232 (5th Cir. 1986). Horn & Hardart asks the Court to analogize this reasoning to the instant case. Although no court has ever applied Rule 59(e) to petitions for "further relief," Horn & Hardart maintains that the absence of judicial application does not imply that Rule 59(e) should not be applied in declaratory

judgment actions. Respondent's Reply at 7. To the contrary, the Court construes judicial silence in this area as an indication that the respondent's argument has no merit.

Rule 59(e) is phrased in terms of altering or amending a judgment; section 2202 provides for a different kind of remedy: further relief. Moreover, Rule 59(e) explicitly states that any motions to alter or amend a judgment "shall be served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). There is no similar language in section 2202. The Court will not divine congressional intent to impose a rigid 10-day time limit on petitions for further relief without the slightest hint that such an obstacle is meant to exist.

More properly, the rule in the federal courts is that a petition for further relief can be brought so long as the petitioner is not barred by laches. *See Edward B. Marks Music Corp., supra,* 255 F.2d at 522; *see also Besler v. United States Dep't of Agriculture,* 639 F.2d 453 (8th Cir. 1981) (20 months elapsed before petitioner sought further relief); *see generally* 10A C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure* § 2771 (1983) (section 2201 "is broad enough to permit the court to grant additional relief long after the declaratory judgment has been entered, provided that the party seeking relief is not barred by laches"). Applying this standard, Amtrak's action, filed less than two months after the decision of the Court of Appeals affirming *Horn & Hardart I,* was undoubtedly timely.

D. *Counterclaim*

Horn & Hardart next sets up a defense based on Rule 13(a). In pertinent part, that Rule states the following:

> [a] *pleading* shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . .

Fed. R. Civ. P. 13(a) (emphasis added). According to the respondent, Amtrak's failure to counterclaim for damages pursuant to Rule 13(a) should bar its attempt to prosecute its current action.

In response to this argument, Amtrak points to the language of Rule 13(a) and argues that the Rule is inapplicable by its own terms. The Court agrees. Rule 13(a) does not require a counterclaim to be filed until such time as a party submits "a pleading." In *Horn & Hardart I,* Amtrak filed no pleading of any kind. *See* Fed. R. Civ. P. 7 (defining "pleadings allowed"). Rather, in response to Horn & Hardart's complaint, Amtrak filed a motion "to dismiss or, in the alternative, for summary judgment." Rule 12 expressly approves this conduct stating that a pleading is generally required in response to a complaint,

> except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted [and] . . . [i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. . . .

Fed. R. Civ. P. 12(b). The cases are uniform in holding that a counterclaim need not be filed in such circumstances. *See Lawhorn v. Atlantic Refining Co.,* 299 F.2d 353, 356

(5th Cir. 1962); *Potter v. Carvel Stores of New York, Inc.*, 203 F. Supp. 462, 464-65 (D. Md. 1962), *aff'd*, 314 F.2d 45 (4th Cir. 1963); *United States v. Thompson*, 262 F. Supp. 340, 342-43 (S.D. Tex. 1966).[5]

Horn & Hardart entreats the Court to disregard formalistic application of Rule 13(a) in order to uphold the Rule's purpose "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." *Columbia Plaza Corp. v. Security Nat'l Bank*, 525 F.2d 620, 625 (D.C. Cir. 1975) (quoting *Southern Constr. Co. v. United States ex rel. Pichard*, 371 U.S. 57 (1962)). The Court declines the invitation. In this case, the policy driving Rule 13(a) must give way to a more important concern. When Amtrak filed a Rule 12(b) motion in response to Horn & Hardart's complaint in *Horn & Hardart I*, Amtrak was in effect arguing that Horn & Hardart had not proffered a valid claim. In holding for Amtrak, the Court confirmed the Railroad's contention. The so-called claim did not require a pleading in response. *See* Fed. R. Civ. P. 13(a), 12(b). In such a case, the party opposing an invalid claim should not be required to fully litigate any claims of its own:

> [i]f one hauled into Court as a defendant has a claim but the adversary plaintiff has not, the nominal de-

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[5]Respondent's attempts to overcome this precedent by relying on *Law Offices of Jerris Leonard, P.C. v. Mideast Systems, Ltd.*, Civil Action No. 85-1610 (D.D.C. June 27, 1986), is unavailing. In *Mideast Systems*, the Court held that, where a party chose to default rather than answer a complaint, the requirement to raise a counterclaim pursuant to 13(a) remained effective. In such a case, there is a requirement to plead and a failure to so act. To the contrary, in the instant case, Amtrak was never required to plead.

> fendant ought to be allowed to name the time and place to assert it. He should not be forced into court by a would-be plaintiff and forced to assert, or lose, a claim which he may choose not to litigate at all, or which he may choose to assert at another time and place. It is one thing to concentrate related litigation once it is properly precipitated. It is quite another thing for the Rules to compel the institution of litigation . . . the Rules ought not to be construed in any such barratrous fashion.

Lawhorn, supra, 299 F.2d at 357. For all the foregoing reasons, the Court holds that Amtrak may proceed on its present course and is not precluded by Rule 13(a) from airing its claims.

E. *Res Judicata*

In a final attempt to block a decision on the merits, Horn & Hardart argues that res judicata extinguishes all Amtrak's damage claims. Res judicata can only apply if the Court finds that the first adjudication ended in a final judgment, that the parties in the first suit were the same as those to be estopped in the second, and that the original court was of competent jurisdiction. *See Montana v. United States,* 440 U.S. 147, 153 (1979); C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4406 (1981). None of these prerequisites is challenged in the instant case. Additionally, for res judicata to operate, Amtrak's claims must be based on the "same cause of action" decided in *Horn & Hardart I. See Montana, supra,* 440 U.S. at 153. In this jurisdiction, to determine whether claims arise out of the same cause of action, the Court must

> [give] weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

U.S. Industries, Inc. v. Blake Constr. Co., Inc., 765 F.2d 195, 205 (D.C. Cir. 1985) (quoting Restatement (Second) of Judgments § 23(2) (1982)). Relying on this test, the Court holds that a damages claim arising out of Horn & Hardart's refusal to vacate its leased properties should have been raised in *Horn & Hardart I*. Once again, Amtrak does not contest this conclusion. Thus, if applicable, traditional res judicata bars Amtrak's petition for further relief.

Notwithstanding this conclusion, Amtrak continues to assert that its suit for further relief is actionable. The Railroad bases its argument on the premise that traditional res judicata principles do not apply to declaratory judgment actions. Petitioner's Opposition at 14. Amtrak's articulation of the declaratory judgment exception is overbroad. The Restatement of Judgments best states the proper scope of the exception and its rationale:

> [w]hen a plaintiff seeks *solely* declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. Instead, he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action.

Restatement (Second) of Judgments § 33 Comment c (1982) (emphasis added); *see also* 22 Am. Jur. 2d *Declaratory*

Judgments § 102 (1965 & 1986 Supp.); Annot., 10 A.L.R. 2d 782 (1950).[6] On its face, this exception is limited. The plaintiff in the original action cannot have sought any coercive relief there, otherwise the ordinary rules of res judicata apply. *See* Restatement (Second) of Judgments § 33 Comment d (1982). Purportedly, lawsuits requesting both declaratory and coercive forms of relief are different from normal lawsuits only in their declaratory label; accordingly, they deserve no special res judicata treatment. *Id.*

Because Horn & Hardart sought both declaratory and coercive relief in *Horn & Hardart I*, mechanical application of these rules would result in res judicata barring Amtrak's petition. In the usual case, this result would be correct, but the Court finds the instant case to be distinguishable and deserving of special treatment. Accordingly, the Court holds that petitioner is not estopped from prosecuting its claims.

The Court does not question the settled rule that a plaintiff who brings a declaratory judgment suit and requests no coercive relief may thereafter sue on those claims arising from the same cause of action that might have been raised in the first proceeding. *See* Restatement

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[6]Neither the Court nor the parties was able to locate valid federal precedent addressing this subject. Two federal cases touch the subject, but neither carries any weight. In *Cimasi v. City of Fenton*, 781 F.2d 116, 118-19 (8th Cir. 1986), the Restatement rule was adopted in a dissenting opinion. In *Mandarino v. Pollard*, 718 F.2d 845, 847-48 (7th Cir. 1983), *cert. denied*, 469 U.S. 830 (1984), the declaratory judgment exception to res judicata was discussed in dicta; the Court held that, because the argument was not raised in the district court, it could not be entertained on appeal. Thus, this seems the first federal case to confront directly the issue.

(Second) § 33 Comment c (1982). The Court acknowledges the propriety of this rule: prosecution of a declaratory judgment, without more, is not the equivalent of prosecuting a full-fledged claim and therefore should not merge or bar other claims the parties might have. *Id.*

However, the Court is not wholly receptive to the corollary to the rule, that whenever the plaintiff in a declaratory judgment suits demands both declaratory and coercive relief, res judicata applies fully to both plaintiff and defendant. The rule is properly applied to plaintiffs. Having initiated a lawsuit for declaratory *and* coercive relief, a plaintiff has set out to prosecute claims in the ordinary manner and consequently should be bound to raise all of them at one time. To allow otherwise would impermissibly allow a plaintiff to split his claims.

The same can be said of at least one species of defendant: those who, having received a complaint for declaratory and coercive relief, answer the complaint. Once an answer is filed a defendant's claims become ripe. Accordingly, Rule 13(a) requires the defendant to state all his claims arising out of the transaction or occurrence at issue. Though an involuntary party, defendant in this class is compelled by the Federal Rules of Civil Procedure to prosecute fully whatever claims he may have, otherwise he will lose them. Inasmuch, it does not seem unreasonable to prevent these defendants from raising new claims arising from the same transaction or occurrence.

The same cannot be said for another species of defendant: those who, having received a complaint mixing declaratory and coercive relief, do not and are not required to answer the complaint. The Court earlier found Amtrak

to be such a defendant; for, pursuant to Rule 13(a), the Railroad was not required to file a counterclaim in *Horn & Hardart I*. *See, supra,* at 9-11. That holding was grounded on the belief that a defendant ought not to be expected to initiate full-scale litigation under unfavorable circumstances unless and until the plaintiff has proved that there is enough of a claim to warrant the defendant to answer. *See Lawhorn, supra,* 299 F.2d at 397. This policy is much the same as the Restatement's rule that stalls the operation of res judicata when a plaintiff brings a wholly declaratory suit. In both cases, res judicata should not function to bar or merge claims arising from the same transaction or occurrence that *could* have been brought, since in both cases there is a judicial recognition that full-fledged claims are not yet at issue. To rule otherwise would permit the requirements of res judicata, a judicially fashioned doctrine, to overturn Rule 13(a), federal law. This the Court cannot allow. Moreover, it is intolerable to grant plaintiffs in a declaratory judgment action the power to force defendants to raise all their actionable claims in that action, regardless of the merit of the plaintiff's claims simply because the plaintiff joined a request for coercive relief.

The modification of the Restatement rule may be summarized as follows: a defendant in an action for declaratory and coercive relief who succeeds in defeating plaintiff's claim on the basis of a Rule 12(b) motion should be viewed as not having asserted any independent claims and, as such, is not barred by res judicata from subsequently litigating claims arising from the same cause of action which could have been litigated in the original pro-

ceeding. Since Amtrak is such a defendant, its petition for further relief is not barred by res judicata.

IV. *MERITS*

Because the arguments raised in Horn & Hardart's motion to dismiss are unconvincing, the Court now turns to the merits of Amtrak's motion for further relief. The petitioner seeks two kinds of damages: liquidated damages for Horn & Hardart's holdover at Penn Station during the litigation of *Horn & Hardart I* and attorney fees. These two claims will be evaluated separately.

A. *Liquidated Damages*

Liquidated damage provisions are valid in the District of Columbia, *see Burns v. Hanover Ins. Co.*, 454 A.2d 325, 327 (D.C. 1982), unless found to constitute a penalty—an agreement "to pay [a] fixed sum[] plainly without reasonable relation to any probable damage which may follow a breach . . . ." *Id.* (quoting *Davy v. Crawford*, 147 F.2d 574, 575 (D.C. Cir. 1945)). The question posed to the Court is whether the liquidated damages clauses in the Amtrak-Horn & Hardart leases are valid.

The three leases which once granted Horn & Hardart space at the Penn Station all have a common end-of-term hold-over clause:

> [t]he parties recognize and agree that the damage to Lessor resulting from any failure by Lessee timely to surrender possession of the demised premises as aforesaid will be extremely substantial, will exceed the amount of monthly rent theretofore payable, and will be impossible of accurate measurement. Lessee therefore agrees that *if possession of the demised*

> *premises is not surrendered to the Lessor within seven days of the date of expiration or sooner termination* of the term of this lease, then *Lessee agrees to pay Lessor as liquidated damages* for each month and for each portion of any month during which Lessee holds over in the premises after expiration or termination of the term of this lease, *a sum equal to three times the average rent* and additional rent which was payable per month under this lease during the last six months of the term thereof.

Lease 31-01-021 ¶ 16; lease 31-01-022 ¶ 17; lease 31-01-023 ¶ 16 (emphasis added). Horn & Hardart disputes neither the validity nor the plain meaning of this provision. Rather, respondent maintains that the contract is modified by D.C. Code Ann. § 45-1407 (1981) ("Refusal to surrender possession; double rent"), which provides, in relevant part, that:

> [i]f the *tenant,* after having given notice of *his* intention to quit, as aforesaid, shall refuse, *without reasonable excuse,* to surrender possession . . . he shall be liable to the landlord for rent *at double the rate of rent* payable . . . for all the time the tenant shall so wrongfully hold over . . . .

D.C. Code Ann. § 45-1407 (1981) (emphasis added). Based on this statute's language, respondent urges that Amtrak must prove that hold-over was "without reasonable excuse" in order to prevail. Respondent further argues that even if Horn & Hardart can offer no reasonable excuse, the maximum damages recoverable by Amtrak is double rent.

The Court is not convinced that section 1407 controls this controversy. The provision has never been explicated by the District of Columbia courts. *Cf. Paton v. Rose,* 205

A.2d 609,(D.C. 1964). There is first some question whether the provision is even relevant to the instant dispute. The statute ostensibly applies to only that situation where the *tenant* has "given notice of *his* intention to quit." *Id.* (emphasis added). It was the landlord that gave notice to quit in this case, not the tenant. Regardless, the language in section 1407 is not broad enough to embrace these parties. Section 1407 is a statutory remedy that may supplement but may not supplant the intentions of private parties to a contract. *Cf. Mendes v. Johnson,* 389 A.2d 781, 786 (D.C. 1978) (en banc) (statutory remedy not controlling unless declared in express terms or by necessary implication). There is no indication from the language in the statute that it was intended to preempt this private contract.

As such the Court turns to the provisions in the leases. The language is clear. Horn & Hardart breached the agreement when it failed to surrender possession of the demised premises "within seven days of the date of . . . sooner termination of the term of this lease." Petitioner's Motion for Further Relief at 12. There is no requirement in the leases that hold-over must be wrongful. Moreover, the Court finds the triple rent provision legitimate. Triple rent does not, without more, constitute a penalty. The leases state that damages to Amtrak caused by hold-over would likely be "extremely substantial." In fact, Amtrak's manager in charge of the Penn Station renovation project estimated the damages caused by Horn & Hardart to exceed $1 million. *See* Declaration of Bruce M. Bourque at ¶ 3. Other jurisdictions have approved even more onerous clauses. *See, e.g., Johnson v. Fuller,* 461 A.2d 988, 989 (Conn. 1983); *Lama v. Manale,* 218 La. 511, 50 So.2d 15, 17 (La. 1950).

In calculating the damages owed to Amtrak, the Court finds the average monthly rent for the last six months of the lease to be $33,501.82. *See* Declaration of A. C. Palerino, Jr., Manager of Amtrak's Real Estate Accounts, at 2. This figure is not disputed by Horn & Hardart. Three times that rent sets the monthly liquidated damages at $100,505.46. The Court finds that Horn & Hardart held over for five months, from March of 1985 until August of 1985.[7] The total damages owed for this period thus equals $502,527.30. This figure must be reduced by $167,510, the amount of rent actually paid by Horn & Hardart to Amtrak during the hold-over period. Respondent's Motion to Dismiss at 29 n.19. Horn & Hardart is thus ordered to pay to Amtrak the sum of $335,017.30. This figure is not an exorbitant one, especially in light of the $180,000 payment made by Amtrak to Horn & Hardart in compensation for its early termination of the Penn Station leases.

B. *Attorney Fees*

Due to Horn & Hardart's breach of its obligation to vacate Amtrak's properties, Amtrak also incurred significant legal expenses defending the actions before this Court, the United States Court of Appeals for the District of Columbia Circuit, and prosecuting the three eviction actions before the New York landlord-tenant court. Amtrak claims that it is entitled to recover attorney fees and costs for these actions. The governing leases speak to this issue:

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[7]In so holding, the Court rejects Amtrak's attempt to collect damages for the month of August, even though Horn & Hardart vacated the premises on August 5, 1985.

> [*i*]*f Lessee shall default* in the observance or performance of any term or covenant on Lessee's part to be observed or performed under or by virtue of any of the terms of provisions in any article of this lease, . . . *and if Lessor make any expenditures* or incur any obligations for the payment of money *in connection therewith, including but not limited to attorney fees in instituting, prosecuting or defending any action* or proceeding, *such sums* paid or obligations incurred *with interest and costs* shall be deemed to be additional rent hereunder and shall be paid by Lessee to Lessor within five (5) days of rendition of any bill or statement to Lessee therefor.

Lease 31-01-021 ¶ 16; lease 31-01-022 ¶ 17; lease 31-01-023 ¶ 16 (emphasis added).

Horn & Hardart takes the position that this provision is inapplicable since there has been no "default." According to Horn & Hardart, the term default "embraces the idea of dishonesty, and a wrongful act . . ., or an act discreditable to one's profession." Respondent's Motion to Dismiss at 31 (quoting Black's Law Dictionary 376 (5th ed. 1979)).

This argument is frivolous. Respondent's definition of "default" constitutes a most attenuated usage—the last definition in a long list. The more common definition of default is "a failure; [a]n omission of that which ought to be done; [s]pecifically, the omission or *failure to perform a legal duty* . . . ." Black's Law Dictionary 505 (4th ed. 1951) (emphasis added). Moreover, the Horn & Hardart leases make it clear that a failure to perform contractual

obligations constitutes a default.[8] Accordingly, the respondent's construction cannot stand.

Turning to the leases themselves, the Court finds that the conditions for imposing attorney fees and costs are satisfied. Lessee Horn & Hardart did "default" and Lessor Amtrak did make expenditures for attorney fees and costs "in connection therewith." Amtrak has requested $52,562.02 for attorney fees and expenses accumulated to date. *See* Declaration of John C. Morland, Associate General Counsel for Amtrak, at ¶ 9. Horn & Hardart has not challenged the propriety of this figure, and the Court finds the amount claimed to be wholly reasonable. As such the Court finds Amtrak entitled to the

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[8]There is a paragraph in the leases entitled "DEFAULT." That provision states the following:

> [i]f Lessee defaults in fulfilling any of the covenants of this lease, . . . or if the demised premises become vacant or deserted, then in any one or more of such events upon Lessor serving a written fifteen (15) days' notice upon Lessee specifying the nature of said default and upon the expiration of said fifteen (15) days, if Lessee shall have failed to comply with or remedy such default, or if the said default or omission complained of shall be of such a nature that the same cannot be completely cured or remedied within said fifteen (15) day period, and if Lessee shall not have diligently commenced during such default within such fifteen (15) day period, and shall not thereafter with reasonable diligence and in good faith proceed to remedy or cure such default, then Lessor may serve a written ten (10) days' notice of termination of this lease upon Lessee . . . .

Lease 31-01-021 ¶ 14(1); Lease 31-01-022 ¶ 15(1); Lease 31-01-023 ¶ 14(1). The language of this provision does not support respondent's theory that breach must be wrongful to constitute a default. To the contrary, default is herein represented to be a neutral act.

$52,562.02 claimed plus the reasonable expenses associated with this motion.

/s/ Oliver Gasch
Judge

Date: April 23rd, 1987

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HORN & HARDART COMPANY,	)	
Plaintiff,	)	Civil Action
v.	)	No. 85-0820
NATIONAL RAILROAD PASSENGER CORPORATION,	)	
Defendant.	)	

ORDER

Upon consideration of the petition of National Railroad Passenger Corporation for further relief, Horn & Hardart's motion to dismiss, oppositions thereto, oral argument, and the entire record herein, and for the reasons stated in the accompanying memorandum, it is by the Court this 23rd day of April, 1987,

ORDERED that Horn & Hardart's motion to dismiss be, and hereby is, denied; and it is further

ORDERED that the petition of National Railroad Passenger Corporation for further relief be, and hereby is, granted to the extent herein provided; and it is further

ORDERED that The Horn & Hardart Company shall pay damages to the National Railroad Passenger Corporation in the amount of $335,017.30 for its hold-over at the Pennsylvania Station properties and $52,562.02 for at-

torney fees and costs associated with the removal of Horn & Hardart therefrom; and it is further

ORDERED that, within thirty (30) days after the filing of this order, the National Railroad Passenger Corporation shall submit an affidavit setting out its reasonable attorney fees and costs associated with the prosecution of this petition for further relief. Any opposition should follow within the time prescribed by the Federal Rules of Civil Procedure.

/s/ Oliver Gasch
Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5722

HORN & HARDART COMPANY, APPELLANT

v.

NATIONAL RAILROAD
PASSENGER CORPORATION

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 85-00820)

Argued February 20, 1986

Decided June 17, 1986

Allen R. Snyder, with whom *Robert J. Elliott* and *Stephen A. Goldberg* were on the brief for appellant.

John C. Morland, with whom *Christopher M. Klein* was on the brief for appellee.

Before: STARR and BUCKLEY, *Circuit Judges*, and WRIGHT, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* STARR.

Dissenting opinion filed by *Senior Circuit Judge* WRIGHT.

STARR, *Circuit Judge*: This appeal is taken from the District Court's grant of summary judgment in favor of the National Railroad Passenger Corporation, more commonly known as "Amtrak." The issue presented is

whether the trial court erred in its interpretation of termination provisions contained in three 1980 leases between Amtrak, as owner of the Pennsylvania Station in New York City, and The Horn & Hardart Company, the proprietor of several commercial establishments situated within Penn Station. Horn & Hardart contends that the District Court improperly granted summary judgment in the face of a need for further factual development both as to the meaning of the termination provisions and as to whether the facts, as ultimately adduced, would have warranted Amtrak's invocation of these clauses. While Horn & Hardart's arguments are not without force, we are persuaded in the end that the District Court's disposition of this case is correct. We therefore affirm.

I

Horn & Hardart is a familiar corporate face in New York. Its operations extend underground, as it were, to include within the confines of Penn Station three restaurant and cocktail lounge operations each of which is the subject of a separate lease. The three leases contain identical provisions in respect of termination, permitting that power to be invoked by Amtrak:

> in the event that [Amtrak] shall require the demised premises for its Corporate purposes . . ., or in case of the proposed re-construction or demolition of the terminal building in which the demised premises are located (resulting thereafter in the re-construction or demolition thereof) . . . .

In November 1984 Amtrak dispatched to Horn & Hardart termination notices with respect to all three leases. Amtrak's stated reason for displacing its long-standing

lessee was to permit construction of an ambitious project, duly approved by Amtrak's board of directors, to modernize Penn Station pursuant to a master plan. As represented to the court below, "Amtrak's current intention is to reconstruct the portion of Pennsylvania Station in which the demised premises are located so that a new ticket facility can be installed on the premises . . . occupied by [Horn & Hardart]." Amtrak's Statement of Material Facts As To Which There Is No Genuine Dispute ¶ 7.

Horn & Hardart challenged Amtrak's use of the termination clause, repairing to United States District Court here in Washington, Amtrak's corporate situs and the jurisdiction whose law governs the three leases in accordance with applicable federal law. 45 U.S.C. § 546(d) (1982). Horn & Hardart averred that since the Penn Station operations commenced in 1967 the Company had expanded substantial sums to improve the leased premises, as most recently evidenced by the conversion in 1980 of a "Horn & Hardart" coffee shop to an "Arby's" and the modernization of its two other premises, the "Iron Horse" and the "Dolphin Bar," in which approximately $1 million had previously been invested. To protect its sizable investments, Horn & Hardart argued, the Company had not only negotiated long-term leases but had succeeded in limiting substantially Amtrak's powers of termination. Specifically, the parties had agreed to the language, which we have quoted above, only after Horn & Hardart had fended off in negotiations a considerably more sweeping termination clause advanced by Amtrak which would have empowered the latter to terminate the leases (upon ninety days' written notice)

> in case [Amtrak] shall desire to use the demised premises, or any portion thereof, either for itself or through agreement with others for transportation or public service purposes, or for construction, reconstruction . . . of that portion of the building of which the demised premises constitute a part . . . .

The upshot of this successful negotiation effort, Horn & Hardart maintained,

> was to restrict Amtrak's right to terminate the leases to situations which would "require" termination because of activities affecting Amtrak as a corporate entity, and to situations involving reconstruction or demolition of the entire "terminal building" in which the leased premises were located, as compared with reconstruction or demolition "of that portion of the building" of which the leased premises were a part.

Verified Complaint ¶ 11, at 5-6.

Arguing that Amtrak's purported terminations were entirely inadmissible under the express terms agreed to by the parties, Horn & Hardart sought a declaration that the terminations were unlawful, an injunction prohibiting Amtrak from seeking to evict or otherwise remove Horn & Hardart from the premises, and compensatory damages of not less than $2.5 million.

Amtrak promptly moved to dismiss the complaint or, alternatively, for summary judgment. Inasmuch as Amtrak submitted evidence outside the pleadings, the District Court treated the motion as falling into the latter category, see Fed. R. Civ. P. 12(b)(6). The court ruled in favor of Amtrak, concluding, in brief, that the operative words of the termination clause, namely "require[d] . . . for Corporate purposes" were unambiguous and thus

amenable to authorative judicial construction. As to the term "require," the court determined that "[b]oth the plain meaning of the word ["require"] as used in the leases and case law supports Amtrak's position." Memorandum Opinion at 6. In so concluding, the trial court rejected Horn & Hardart's argument that, as evidenced by the Declaration of one of its officers who had conducted the lease negotiations on behalf of the Company, the term "require" was substituted for the term "desire" in order "to reflect the fact that the leases could be terminated only if termination was mandatory or indispensible." *Id.* at 8. *See* Horn & Hardart's Opposition to Defendant's Motion to Dismiss at 12 ("[T]he Leases use 'require,' which in this context clearly means 'to demand as necessary or essential' or 'to make indispensable.' ") (citation omitted). So too, the District Court eschewed the Company's interpretation of "Corporate purposes," which Horn & Hardart construed to mean "that Amtrak may take Horn & Hardart's space only when such space is indispensable for Amtrak's continued existence as an entity which provides "intercity and commuter rail service.' " Opposition at 19 (citation omitted). In the trial court's view, this proffered construction was "unduly narrow." Memorandum Opinion at 8. Invoking "plain meaning," the court determined:

> [I]t is obvious that Amtrak's use of Horn and Hardart's space for expanding ticket counter and waiting room facilities is for Amtrak's corporate purposes of providing modern, cost-efficient, intercity passenger rail transportation service.

Id. at 9.

Looking to the uncontradicted evidence as to the use to which the leased premises would in fact be put, the court concluded that "Amtrak has the right to terminate the leases in order to expand its ticket counter and waiting area because Amtrak 'requires' the demised premises for its 'Corporate purposes.'" *Id.* at 9. In so doing, the court construed what it viewed as the critical term, "require," as "necessary or needed," not, as Horn & Hardart vigorously argued, "mandatory or indispensable." *Id.*

II

On appeal, Horn & Hardart's principal argument is that the lease terms were infected by "patent ambiguity," Brief for Appellant at 10, thus rendering the contract dispute unsuitable for summary judgment. To compound this threshold legal error, the Company contends, the District Court's summary disposition resurrected Phoenix-like the sweeping, pro-Lessor termination clause that the parties, by virtue of Horn & Hardart's effective negotiation efforts, had discarded. That is to say, "[t]he trial court's interpretation is tantamount to construing the word 'require' to mean 'desire.'" *Id.* at 14. This fundamental legal error, the Company asserts, had the effect of cutting off, without warrant, the development of "relevant facts" through "essential discovery," *id.* at 15, all in derogation of the orderly procedures contemplated by the Federal Rules of Civil Procedure, especially Rule 56(f).

The Company suggests that the court below, remaining as it did on high legal ground instead of delving into the facts, ignored the incongruence of its legal pronouncements with the facts themselves. Such facts include facial

alterations to the Arby's lease and Horn & Hardart's acceptance of Amtrak's sweeping termination clause in a contemporaneously executed lease for retail space (aside from the three leases at issue here). What is more, the Company argues, the pivotal term, "Corporate purposes," is not only ambiguous but is clearly less expansive than Amtrak's proffered interpretation, which would encompass any corporate activity that does not stray beyond the outer perimeter of the *ultra vires* doctrine. This extraordinary sweep, the Company maintains, could not possibly have been intended by the parties inasmuch as the parties in their negotiations modified the termination provision so as to substitute "Corporate purposes" for "transportation or public service purposes." Taken together, the pro-Horn & Hardart modifications to the lease provisions were meant, as the Company sees it, to restrict Amtrak's right to terminate. The District Court's pretrial disposition, Horn & Hardart argues, permits Amtrak unfairly to claim victory in the courthouse despite its defeat at the negotiating table.

To exacerbate matters, the Company goes on, Amtrak is thereby permitted to effect a forfeiture of Horn & Hardart's valuable leasehold interests, a result disfavored by the more merciful principles animating courts of justice in construing contracts. Finally, in Horn & Hardart's view, the District Court's interpretation has rendered surplusage the "re-construction" provision in the termination clause, which limits Amtrak's right to abrogate the leases to when the *terminal building*—not just the *portion* of the building of which the leased premises are a part—is reconstructed.

III

Notwithstanding the able arguments of counsel for the Company, we find ourselves in full agreement with the District Court's pivotal determination that the contract language is properly amenable to dispositive interpretation as a matter of law. Consistent with applicable law, *see, e.g., Clayman v. Goodman Properties, Inc.,* 518 F.2d 1026, 1034 (D.C. Cir. 1974), the District Court turned to the language of the contract itself to determine whether the provision was ambiguous. As the District Court rightly said, the construction of *unambiguous* contractual language is a matter of law entrusted to the court. *Washington Metropolitan Area Transit Authority v. Mergentime Corporation,* 626 F.2d 959, 961 (D.C.Cir. 1980). The issue, then, is whether the language that has so sharply divided the parties is, in truth, *reasonably* susceptible of different constructions or interpretations. *Papago Tribal Utility Authority v. FERC,* 723 F.2d 950, 955 (D.C. Cir. 1983), *cert. denied,* 104 S. Ct. 3511 (1984).

We conclude that the District Court's interpretation of the language, based upon its plain meaning, is unimpeachable. Horn & Hardart's construction of the contract, whether it is based on the term "corporate purpose" alone or on the juxtaposition of the terms "require" and "corporate purpose," is not yielded by a fair examination of the language itself. The sole interpretation advanced by the Company before the District Court and on appeal is, as we have seen, that Amtrak can lawfully trigger the clause "only if termination was mandatory or indispensible" for Amtrak's corporate purposes. Opposition at 8; *see also* Reply Brief for Appellant at

4-5. This is a reading to which the actual language does not reasonably admit. Corporate life and death does not have to be on the line to "require [space] . . . for Corporate purposes." We concur fully with the able District Judge's view that the Company's strained interpretation "would render the termination provision virtually useless and would be inconsistent with Amtrak's mandate from Congress to provide modern, efficient, rail passenger service." Memorandum Opinion at 6.

Contrary to Horn & Hardart's assertions, our rejection of its corporate life-and-death standard does not render the termination provision operable at the whim of the landlord. The undisputed evidence shows that Amtrak did not terminate the Company's lease in order to secure a more lucrative leasehold arrangement. Rather, Amtrak, pursuant to a broad plan of substantial improvements to Penn Station, sought to employ the precise space occupied by Horn & Hardart for expanded ticket counter space and other, non-leasehold purposes. Those specific purposes, under the undisputed facts presented here, suffice to bring the lessor's reason for termination within the plain meaning of the lease's termination provision. That the use of the demised premises by Amtrak in this instance is "reasonably necessary" to give life to one of its general corporate purposes is further supported by Horn & Hardart's acknowledgment that Amtrak could have terminated the leases pursuant to the leases' condemnation clause, a provision which incorporates Amtrak's right to acquire or take property when "required for intercity rail passenger service." 45 U.S.C. § 545(d)(1) (1982).

Horn & Hardart's remaining concerns need not detain us. There is, fairly viewed, no "forfeiture" at work here

since the leases either did (Arby's) or could have contained a cancellation premium clause. Indeed, pursuant to the Arby's cancellation premium clause, Horn & Hardart in August 1985 received $180,000 from Amtrak; what is more, the original 1967 lease likewise contained a cancellation premium clause. The disincentive of a cancellation premium clause constituted the specific protective mechanism to which the parties agreed.

We are similarly unpersuaded that the District Court's reading of Part 1 of the termination clause ("require . . . for Corporate purposes") renders surplusage the provisions of Part 2 of the clause ("re-construction"). The clauses do indeed overlap in this particular setting, but overlap in one situation cannot properly be equated with the unhappy condition of "surplusage." For it appears to us that the latter Part—the "reconstruction" portion of the clause—may have efficacy in other settings, such as where reconstruction might be forced on Amtrak by, say, Madison Square Garden which sits atop the subterranean provinces of Penn Station.

Finally, we observe merely in passing that the acceptance of Horn & Hardart's plea that this case move beyond the summary-judgment station and onto the tracks of discovery and trial would likely lead to a highly extensive factual undertaking as to the "indispensability" of the substantial improvements project now underway and approved by the Amtrak board of directors. The unlikelihood that the parties contemplated such a result fortifies us in our conclusion, reached independently for the reasons heretofore stated, that the plain language of this

provision reasonably admits only of the construction discerned by the District Court.

Affirmed.

WRIGHT, *Senior Circuit Judge, dissenting*: I am unable to agree with the majority that the contract in dispute in this case is so unambiguous as to admit of only one reasonable construction. Accordingly, I respectfully dissent.

As an initial matter, I note that this case does not present us with the issue whether Amtrak may evict its tenant Horn & Hardart. Indeed, Horn & Hardart has already been displaced. Rather, the issue is the extent to which Amtrak is liable to Horn & Hardart for damages resulting from the already-completed eviction.

In the usual case when a landlord evicts his tenant in violation of a lease he assumes the burden of compensating his tenant for the breach. The parties, of course, may alter this arrangement either by allowing the landlord to evict the tenant *without* violating the lease or by providing that the landlord may evict the tenant without liability in only a narrow range of circumstances. In this case Horn & Hardart argues that the parties agreed to the latter, allowing Amtrak to terminate the lease only in a very narrow range of circumstances. This does *not* mean that unless those circumstances are met Amtrak is burdened with the presence of Horn & Hardart's restaurants. Amtrak may proceed either through its condemnation power or, as in this case, through an arguable violation of the lease to rid itself of its unwanted tenant. In either case Amtrak must pay damages to its tenant. But surely *that* is not such an unreasonable result; landlords and tenants often agree to be bound in leases without termination clauses.

Horn & Hardart does not rest its case on a reading of the term "Corporate purpose" alone. Indeed, it specifically acknowledged both in the trial court and on appeal that the term "Corporate purpose" might, in the abstract, include the proposed renovation. *See* Transcript of Proceedings (April 29, 1985) at 34-35; Reply Brief for Appellant at 2-3. Rather it argues that *regardless* of the scope of the term "Corporate purpose" the court must examine the nexus between that purpose and the termination of Horn & Hardart's leases. *See* Reply Brief for Appellant at 2-3 ("Whether termination of Horn & Hardart's leases is '*required*' for Amtrak's 'Corporate purposes,' however, is a wholly separate issue, and one that greatly restricts Amtrak's right to terminate.") (emphasis in original).

The District Court and the majority find that "required" means "reasonably necessary." Although I wholly agree that the "reasonably necessary" construction of the challenged contract clause *might* reflect the intent of the parties to this contract, I am unable to agree that this construction represents the only possible reasonable construction of the contract. As Horn & Hardart argues, this clause might also mean that Amtrak may only terminate the lease when use of the space is *required* for a permissible corporate purpose. The majority's construction of this contract requires this court to assume that Horn & Hardart entered into this long-term contract, made large investments protected only by limited cancellation premium clauses, and left itself open to eviction whenever Amtrak decided that the use of the space was "reasonably necessary" for its general purposes. Although Horn &

Hardart might have agreed to such a contractual relationship, it is by no means clear to me that it did not intend, through the use of the word "require," to place more stringent limitations upon the right of termination. Certainly I would not reach such a conclusion without consideration of extrinsic evidence bearing on the intent of the parties. Moreover, I note that "require" and "reasonably necessary" are hardly synonyms. Had the parties intended the contract to allow termination whenever Amtrak found it "reasonably necessary" to further one of its corporate purposes, they could easily have incorporated such language. Thus, because the contract is reasonably susceptible of different reasonable interpretations, I would hold that summary judgment was inappropriate and would remand this case for trial. *See Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 955 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984).

Because the majority reaches the opposite result, I respectfully dissent.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HORN & HARDART COMPANY, Plaintiff,	)	
	)	Civil Action
v.	)	
	)	No. 85-0820
NATIONAL RAILROAD PASSENGER CORPORATION, Defendant.	)	

MEMORANDUM

This is an action arising out of the termination by the National Railroad Passenger Corporation ("Amtrak") of three leases of the Horn & Hardart Company for restaurant space at Amtrak's Pennsylvania Station in New York City. Plaintiff seeks declaratory and injunctive relief as well as compensatory damages which Horn & Hardart may suffer as a result of Amtrak's alleged unlawful termination of the leases. Presently before the Court is defendant's motion to dismiss or, in the alternative, for summary judgment. As Amtrak has submitted evidence outside the pleadings, the Court treats this motion as one for summary judgment. *See* Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the Court grants defendant Amtrak's motion for summary judgment.

I.

Defendant is a District of Columbia corporation created under the authority of the Rail Passenger Service Act, 45 U.S.C. § 501 *et seq.*, to provide modern, efficient intercity railroad passenger service. On June 1, 1980,

Horn & Hardart entered into three lease agreements with Amtrak to rent space in Pennsylvania Station. The first lease was for space to operate a restaurant and cocktail lounge known as the Iron Horse. The second lease was for space to operate an Arby's restaurant, and the third lease was for space to operate a snack bar and lounge known as the Dolphin Bar.

Each of the leases contains the following provision:

> Lessor [Amtrak] shall have the right to terminate this lease at any time upon giving to the Lessee [Horn & Hardart] ninety (90) days' prior written notice of its intention so to do in the event that the Lessor shall require the demised premises for its Corporate purposes . . . or in case of the proposed re-construction or demolition of the terminal building in which the demised premises are located (resulting thereafter in the re-construction or demolition thereof).

On November 29, 1984, Amtrak sent plaintiff termination notices for the three leases based upon the above termination provisions. Amtrak intends to use most of the premises now occupied by plaintiff for a ticket facility and expanded waiting room area. The reconstruction is part of the first phase of a master redevelopment plan for Pennsylvania Station. Phase I, which is estimated to cost about $13 million, has been approved by Amtrak's Board of Directors as a "stand-alone" project. The Phase I improvements are designed to provide greater passenger comfort and safety, more effective operation of Pennsylvania Station, reduced maintenance, utility and passenger service costs, and increased retail revenues as new leases with higher rentals are substituted for older lease agreements. In addition to expanding the ticket facilities and

the waiting area, the first phase includes construction of new restrooms, a centrally located Metroliner/first class passenger lounge, improved baggage facilities, and improved access to Amtrak platforms.[1]

Most of the Phase I improvements will be made on Level B, the upper passenger level of Pennsylvania station where the Iron Horse, Arby's and the Dolphin Bar snack bar are located. Phase I also will involve use of the Dolphin Bar lounge located on the "A" level of Pennsylvania Station. Part of the Dolphin Bar snack bar will be used for a handicapped-accessible elevator and a public stairway connecting the Dolphin snack bar and the Iron Horse on Level B will be replaced with an escalator. In addition, plumbing for new restrooms on the B level will run through the A level Dolphin Bar lease property. The remainder of the Dolphin snack bar property will be used as a training facility for Amtrak employees or for Amtrak offices.

II.

As this action involves the construction of the lease agreements between Amtrak and Horn & Hardart, it is helpful at the outset to set forth the legal standards applicable to construction of contractual provisions by the Court.

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[1]The Phase I project originally included other improvements such as a combined ticketing and baggage facility akin to a modern airport-type operation, new escalators and elevators and employee facilities. These improvements were scaled down or eliminated altogether under Phase I when it became apparent that the $13 million authorized by the Board of Directors for Phase I would not cover all of the costs of the plan as originally envisioned.

Whether or not a contract is ambiguous is a question of law for the Court to decide. *Clayman v. Goodman Properties, Inc.*, 518 F.2d 1026, 1034 (D.C. Cir. 1974); *Kass v. William Norwitz Company*, 509 F. Supp. 618, 623 (D.D.C. 1980). Construction of unambiguous contractual provisions also is a matter of law to be decided by the Court. *Washington Metropolitan Area Transit Authority v. Mergentime Corporation*, 626 F.2d 959, 961 (D.C. Cir. 1980); *Kass v. William Norwitz Company*, 509 F. Supp. at 623. Interpretation of an ambiguous contract is a question of fact for the fact finder. *Clayman v. Goodman Properties, Inc., supra; Kass v. William Norwitz Company, supra.*

Under District of Columbia law,[2] a contract is ambiguous if it is reasonably susceptible of different constructions or interpretations, or of two or more different meanings. *Papago Tribal Utility Authority v. F.E.R.C.*, 723 F.2d 950, 955 (D.C. 1983), *cert. denied*, 104 S. Ct. 3511 (1984); *Kass v. William Norwitz Company, supra*, 509 F. Supp. at 624; *Burbridge v. Howard University*, 305 A.2d 245 (D.C. App. 1973):

> [A] contract is ambiguous when, and only when, it is, or the provisions in controversy are, reasonably or fairly susceptible of different constructions or interpretations, or of two different meanings, and it is not ambiguous where the court can determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends . . . .

305 A.2d at 247. A contractual provision, however, is not ambiguous simply because the parties later disagree on its

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[2]District of Columbia law governs leases and contracts entered into by Amtrak. 5 U.S.C. § 546(d).

meaning. *Papago Tribal Utility Authority v. F.E.R.C., supra,* 723 F.2d at 955; *Kass v. William Norwitz Company, supra,* 509 F. Supp. at 623.

If the dispositive issue on summary judgment involves the construction of a contract, as in this case, an ambiguity in the contract raises a genuine issue of material fact, precluding summary judgment. *Davis v. Chevy Chase Financial Ltd.,* 667 F.2d 160, 169 (D.C. Cir. 1981); *Kass v. William Norwitz Company, supra,* 509 F. Supp. at 624. Where a contract is not "wholly unambiguous," the parties have a right to present oral testimony and other extrinsic evidence to aid in its interpretation. *Davis v. Chevy Chase Financial Ltd., supra,* 667 F.2d at 170.

III.

Amtrak seeks summary judgment based upon the provision in each of the Horn & Hardart leases which gives Amtrak the express right to terminate the lease if Amtrak "requires" the demised premises "for its Corporate purposes." Amtrak contends that its use of Horn & Hardart's leased space to expand ticket counter and waiting room facilities at Pennsylvania Station is required for Amtrak's corporate purpose of providing modern, efficient passenger train service.

The dispute between the parties centers on the meaning of the word "requires." Amtrak contends that as used in the Horn & Hardart leases "requires" means what is reasonably necessary, needed or called for, for its corporate purposes. Horn & Hardart, on the other hand, argues that "requires" in the leases means to demand as

mandatory or indispensable and that Amtrak's use of Horn and Hardart premises for expanded ticket counter and waiting room facilities is not mandatory or indispensable for Amtrak's corporate purposes. Both the plain meaning of the word as used in the leases and case law supports Amtrak's position.

Black's Law Dictionary defines "require" to mean "to direct, order, demand, instruct, command, claim, compel, request, need, exact." Black's Law Dictionary 1468 (4th ed. 1951). Similarly, Webster's Dictionary defines "require" to mean "to call for as suitable or appropriate in a particular case"; "to demand as necessary . . . ." Webster's Third International Dictionary at 1929 (1976). Although "require" can also mean to demand as essential or "to make indispensable," the term as used in the context of the Horn & Hardart leases is not reasonably susceptible to such meaning. Horn & Hardart's construction of "require" would render the termination provision virtually useless and would be inconsistent with Amtrak's mandate from Congress to provide modern, efficient, rail passenger service. Improvement of passenger comfort and safety and the efficiency of Amtrak's operations furthers this statutory mandate. The parties are held to a reasonable interpretation of the lease terms.[3]

Amtrak's construction of the term "require" is supported by case law. In *Needles v. Kansas City,* 371 S.W. 2d 300, 306, (Mo. 1963), for example, the court construed the phrase "required to finance this project" in a contract

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[3]Significantly, plaintiff concedes that Amtrak is entitled to terminate the leases pursuant to the leases' condemnation clause, which empowers Amtrak to terminate if the demised premises are "required for intercity rail passenger service."

to mean whatever was reasonably and in good faith "needed," "wanted" or "called for to finance" the project. The term "require" in *Needles* is used in the same way in the leases at issue. Similarly, in *City of Waukegan v. Stanczak,* 6 Ill. 2d 594, 129 N.E.2d 751 (1955), the court found that the term "require" in a condemnation petition meant necessary or "to need." *See also Seasongood v. United States,* 331 F. Supp. 486, 489 (S.D. Ohio 1971); *Boyce v. Stringfellow,* 114 S.W. 652, 654 (Tex Civ. App. 1908).[4]

Plaintiff's reliance on *Mississippi River Fuel Corp. v. Slayton,* 359 F.2d 106, 119 (8th Cir. 1966), *rev'd on other grounds sub nom. Levin v. Mississippi River Fuel Corporation,* 386 U.S. 162 (1967), and *Scuncio Motors, Inc. v. Subaru of New England, Inc.,* 555 F. Supp. 1121 (D.R.I. 1982), *aff'd,* 715 F.2d 10 (1st Cir. 1983), is misplaced. In those cases the term "require" was construed as implying something mandatory, not something permitted by agreement. Amtrak, however, does not contend that "require" as used in the leases means something merely permitted or requested as contended in *Mississippi River* and *Scuncio Motors.*[5]

Horn & Hardart also places considerable reliance on an affidavit of one of its officers involved in the lease negotiations. Affiant Franklin Levy states that the word "re-

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[4]There are a host of cases interpreting "necessary" as not requiring absolute necessity. *See, e.g., Hope Deliverance Center, Inc. v. Zoning Board of Appeals,* 452 N.E.2d 630, 634 (Ill. 5th Civ. App. 1983); *Southland Royalty Company v. United States,* 582 F.2d 604, 606 (Ct. Cl. 1978), *cert. denied,* 441 U.S. 905 (1979); *Florida East Coast Railway Company v. City of Miami,* 321 So. 2d 545, 548-49 (Fla. 1975).

[5]*Railway Labor Executive Association v. United States Railroad Retirement Board,* 749 F.2d 856, 861 n.8 (D.C. Cir. 1984), distinguishes *Mississippi River* on the same ground.

quire" was substituted for the word "desire" to reflect the fact that the leases could be terminated only if termination was mandatory or indispensable. This argument is without merit. It is well settled that parties to contracts will be held to a reasonable interpretation of the contract and will not be permitted to assert their individual subjective intent. *NTA National, Inc. v. DNC Services Corporation,* 511 F. Supp. 210, 222 (D.D.C. 1981); *1901 Wyoming Avenue Cooperative Association v. Lee,* 345 A.2d 456 (D.C. App. 1975). Moreover, there is no evidence that Mr. Levy ever expressed or communicated to Amtrak this subjective belief prior to execution of his affidavit. *See NTA National, Inc. v. DNC Services Corporation,* 511 F. Supp. 210, 222 (D.D.C. 1981). In any event, plaintiff may not establish an ambiguity by resorting to extrinsic evidence such as the opinion of the Horn & Hardart lease negotiator when the Court determines from the face of the document that an ambiguity does not exist. *Davis v. Chevy Chase Financial, Ltd.,* 667 F.2d 160, 170 (D.C. Cir. 1981); *Clayman v. Goodman Properties, Inc.,* 518 F.2d 1026, 1034 (D.C. Cir. 1973).

Plaintiff next argues that the term "Corporate purposes" as used in the leases means purposes vital to or at the core of Amtrak's continued existence as a corporate entity and that expansion of Amtrak's ticket counter and waiting area facilities at Pennsylvania station is not for Amtrak's "Corporate purposes." This argument is meritless. Plaintiff has offered no persuasive authority for its unduly narrow interpretation of the term "Corporate purposes." Indeed, plaintiff's counsel at oral argument conceded that the term means within the proper purposes of the corporation, not *ultra vires.* Based on the plain

meaning of the term, it is obvious that Amtrak's use of Horn and Hardart's space for expanding ticket counter and waiting room facilities is for Amtrak's corporate purposes of providing modern, cost-efficient, intercity passenger rail transportation service. *See Weightman v. Clark,* 103 U.S. 256, 260 (1880) ("corporate purpose" described as some purpose germane to the general scope of the object for which the corporation was created").[6]

IV.

Pursuant to the terms of the Horn & Hardart leases Amtrak has the right to terminate the leases in order to expand its ticket counter and waiting area facilities because Amtrak "requires" the demised premises for its "Corporate purposes." Based on the plain language of the leases, the Court concludes that the only reasonable construction of the word "require" as used in the leases is that Amtrak is entitled to terminate the leases if the demised premises are necessary or needed for its corporate purposes. Amtrak's use of the premises does not have to be mandatory or indispensable to its corporate purposes. To find otherwise would be inconsissent with the plain and reasonable meaning of the corporate purpose termination provision in the Horn & Hardart leases.

/s/ Oliver Gasch
Judge

Date: May 30th, 1985

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[6]In view of the Court's ruling on Amtrak's right to terminate the leases in question for corporate purposes, it need not decide whether summary judgment is appropriate under the lease provision which gives Amtrak the right to terminate the lease in case of proposed reconstruction of the terminal building.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HORN & HARDART COMPANY, Plaintiff,	)	
v.	)	Civil Action
NATIONAL RAILROAD PASSENGER CORPORATION, Defendant.	)	No. 85-0820

ORDER

Upon consideration of defendant's motion to dismiss or, in the alternative for summary judgment, the supporting memoranda and opposition thereto, and oral argument, and it appearing to the Court that there are no material issues of fact in dispute, and for the reasons stated in the memorandum accompanying this order, it is by the Court this 30th day of May, 1985.

ORDERED that defendant's motion for summary judgment be, and hereby is, granted.

/s/ Oliver Gasch
Judge